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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 107

OLD MISSION PORTLAND CEMENT COMPANY,
PETITIONER,

vs.

GUY T. HELVERING, AS COMMISSIONER OF
INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 12, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934

SUPREME COURT OF THE UNITED STATES

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APPEARANCES

For Taxpayer:

FREDERICK C. ROHWERDER, C. P. A.

GEO. E. H. GOODNER, Esq.

For Commissioner:

J. A. ADAMS, ESQ.,

H. COX, ESQ.

DOCKET ENTRIES.

1928

May 23—Petition received and filed. Taxpayer notified. (Fee paid)

" 24—Copy of petition served on General Counsel.

Jun. 27—Answer filed by General Counsel.

Jul. 11—Copy of answer served on taxpayer. General Calendar.

1930

Sep. 19—Hearing set Oct. 30, 1930.

Oct. 16—Notice of appearance of Geo. E. H. Goodner as counsel for taxpayer filed.

" 16—Motion for continuance to after Jan. 1, 1931 filed by taxpayer. 10/21/30 granted to 2/1/31.

Nov. 22—Hearing date changed from Feb. 1 to Feb. 2, 1931.

Dec. 8—Notice changing hearing date from Feb. 1, to Feb. 5, 1931.

1931

Jan. 6—Application for order to take depositions filed by taxpayer.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1931

Jan. 8—Objections to order to take depositions filed by General Counsel.

" 12—Order denying application to take depositions and to place proceedings on Circuit Calendar also denied—further ordered that appeal remain on Day Calendar of Feb. 5, 1931 at Washington, D. C. entered.

" 26—Motion for leave to amend petition, amendment tendered, filed by taxpayer. 1/27/31 copy served.

" 27—Copy of motion and amendment served on General Counsel.

Feb. 5, 6, 7—Hearing had before Mr. Smith, Div. 5 on merits. Amendment received — amended answer filed and received. Briefs due May 1, 1931.

" 11—Transcript of hearing Feb. 5, 1931 filed.

" 20—Transcript of hearing Feb. 6, 1931 filed.

" 24—Transcript of Feb. 7, 1931, filed.

Apr. 28—Motion for extension to June 15, 1931 to file brief filed by taxpayer. 4/30/31 granted to both parties.

Jun. 12—Motion for extension to June 25, 1931 to file brief filed by taxpayer.

" 12—Motion granted—both parties to June 25, to file briefs.

" 19—Motion to correct transcript of record filed by taxpayer. 6/9/31 granted.

" 25—Brief filed by taxpayer.

Aug. 11—Motion for rehearing filed by General Counsel. 8/14/31 denied.

1931

Sep. 16—Second motion for rehearing filed by General Counsel. [1]

1932

Jan. 16—Order denying motion for rehearing entered.

" 21—Findings of fact and opinion rendered, Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

Mar. 2—Order that figure "83" appearing on last line, page 24 of Board's report promulgated January 21, 1932, be deleted, entered.

" 30—Notice of settlement filed by General Counsel.

Apr. 1—Hearing set April 27, 1932 on settlement.

" 26—Consent to settlement filed by taxpayer.

" 27—Hearing had before Mr. Smith on settlement under Rule 50—not contested—referred to Mr. Smith for decision.

" 30—Decision entered, Charles P. Smith, Div. 5.

Oct. 29—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 29—Proof of service filed by taxpayer.

Dec. 20—Motion for extension to Jan. 27, 1933 to prepare statement & transmit record filed by taxpayer.

" 20—Order enlarging time to Jan. 27, 1933 for preparation of evidence and delivery of record entered.

1933

Jan. 27—Motion for extension of 60 days to prepare statement and transmit record filed by taxpayer.

" 27—Order enlarging time to 3/28/33 for preparation of evidence and delivery of record entered.

Mar. 13—Statement of evidence lodged.

" 13—Notice of lodgment of statement and of hearing March 27, 1933 to approve same filed. Proof of service thereon.

" 13—Motion for extension of 30 days to prepare statement and transmit record filed by taxpayer.

" 16—Notice changing hearing to Mar. 29, 1933.

" 18—Copy of order from 9th Circuit ordering original exhibits to be transmitted to Court filed.

" 22—Motion to continue hearing to April 19, 1933 filed by taxpayer. 3/24/33 granted.

" 28—Objection to statement of evidence filed by General Counsel.

Apr. 22—Agreed statement of evidence approved and ordered filed.

" 19—Hearing had before Mr. Van Fossan, Div. 9 on approval of statement of evidence—on motion of respondent continued one week.

" 19—Order of continuance to April 26, 1933 entered.

1933

Apr. 25—Praecipe with proof of service thereon filed.

" 26—Order enlarging time to May 15, 1933 to file certified copies of record papers entered.

May 15—Order enlarging time to June 15, 1933 for transmission and delivery of record entered. [2]

United States Board of Tax Appeals

Docket No. 38853

OLD MISSION PORTLAND CEMENT COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:G-7-AEW) dated April 2, 1928, and as a basis of its preceedings alleges as follows:

1. The petitioner is a California corporation with its principal place of business at 225 Bush Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on April 2, 1928.

3. The taxes in controversy are income and profits taxes for the calendar years 1923, 1924, 1925, and 1926, and for the aggregate amount of $24,373.24.

4. The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(a) The failure of the respondent to allow in each of the years in question, a reasonable deduction for depletion of limestone deposits owned and operated by petitioner.

(b) The failure of the respondent to exclude from taxable income for 1923 the sum of $3,769.57, representing the excess of par value over the sum of the cost and unamortized discount [3] of its own bonds repurchased during that year.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner was incorporated February 10, 1912, under the laws of the State of California, for the purpose of engaging in the manufacture of Portland cement, with a capital of 350,000 shares of common stock of a par value of ten dollars each.

(b) Petitioner acquired on August 7, 1912, fee title to 2,463 acres of land in San Benito, Santa Cruz, and Monterey counties, California, containing the Barbee, Underwood, and Flint limestone deposits and an uncompleted cement plant in consideration of the issue of 175,000 shares of its common stock, par value $1,750,000.00, to B. M. Aikens as representative of the Bondholder's Committee of the San Juan Portland Cement Company. The latter com-

pany acquired these properties by foreclosure and sheriff's sale on December 4, 1911.

(c) The fair market value of the stock exchanged for this property on August 7, 1912, was $1,750,000.00, the par value thereof. Although never listed on any public exchange, this stock was being sold in the open market to the general public at par. Over 6,100 shares were sold for their full par value to approximately seventy-five different purchasers between August 7, 1912, and March 31, 1913.

(d) The value as of August 7, 1912, of the property acquired on that date for stock was as follows: [4]

Uncompleted cement plant at cost to San Juan Portland Cement Company	$ 545,346.90
Warehouse supplies at cost to San Juan Portland Cement Company	2,000.00
San Juan plant site, 160 acres at $300.00	48,000.00
Chittenden Ranch, 1,010 acres farming and grazing land,	75,000.00
Surface value of 1,293 acres mineral and grazing land,	45,000.00
Limestone in 1,293 acres comprising Barbee, Underwood, and Flint limestone deposits,	1,034,653.10
Total,	$1,750,000.00

(e) At the date of acquisition, these mineral deposits were generally believed to be of great value

because of the large amount of limerock estimated to be contained therein by numerous well-known and competent geologists, engineers, and cement plant managers, which estimates appeared to be fully justified by the outcrops and exposures by development at the time. A report made by H. F. Collett, mining engineer of San Francisco, on December 28, 1911, for petitioner just prior to acquisition, a copy of which is attached and marked "Exhibit B", estimated 500,000 tons in the Underwood deposit and 4,849,883 tons in the Flint deposit, or a total of 5,349,883 tons available for cement manufacture. The extent and quality of the Barbee deposit was considered doubtful by most authorities. Based on this estimate, the consideration paid was 19.34 cents per ton of limestone.

(f) Exploitation of these deposits begun in 1918 proved the indications of outcrops and exposures by superficial development to be deceptive. The Barbee and Underwood deposits were exhausted in 1920 after producing 203,587 tons. The Flint deposit, beginning in March, 1921, produced prior to March 31, 1927, [5] some 1,356,898 tons at which time petitioner's engineer estimated 140,000 tons remaining. The total mineral content of these deposits has proved to be approximately 1,700,000 tons of limestone.

(g) After exhaustion of the Underwood deposit in March, 1920, and until completion of transportation facilities from the Flint deposit early in 1921, limestone was used from small scattered deposits on

adjacent lands under an oral agreement providing for payment of a royalty of ten cents per ton.

(h) Respondent determined the March 1, 1913, value of petitioner's limestone to be $63,121.00 by an analytic appraisal based upon discounting a royalty rate of ten cents per ton paid during 1920 and 1921 on these adjacent deposits. This discounted rate of $.03713, multiplied by the total limestone reserves of 1,700,000 tons, gave a value of $63,121.00.

(i) These adjacent deposits were not comparable with those of petitioner and the royalty paid is no criterion of the value of petitioner's deposits in 1913. For example, their location and character required haulage by motor truck. Their relative value is indicated by increased operating cost of rock per ton in 1920 of $0.88 over that of rock from the Underwood deposit in 1919.

(j) Deposits of limestone of quality and magnitude justifying a cement plant are rare in California. The few such deposits in the vicinity of San Francisco bay, including petitioner's deposits, were all held for years prior to 1913 by cement companies as the essential basis of their business. Even at considerable distances from centers of consumption and sources of labor and supplies, there are no large areas of limestone in accessible [6] locations in California such as are found in the Mississippi Valley and Appalachian regions.

(k) In 1912 the exhaustion of a deposit in the San Francisco bay area, comparable with those of petitioner, forced resort to the next most available deposit. Private transportation facilities cost $1,-

250,000.00 and the increased freight cost in 1913 was 71 cents per ton of rock. By the methods of analytic appraisal applied by respondent the freight differential alone indicates a value of 26.3 cents per ton of rock in place in the deposit comparable with petitioner's deposits.

(l) In 1921, an undeveloped and unequipped limestone deposit three miles from railroad and remote from centers of consumption, labor, and supplies, was leased on a royalty of five cents per barrel of cement for one hundred years, with large and increasing minimum annual payments. Since 3.4 barrels of cement are made by petitioner from one ton of limestone, this royalty is equivalent to 17 cents per ton on rock from petitioner's deposit. The plant using this material competes in the San Francisco bay area with petitioner under a handicap of $2.80 higher freight per ton of cement, or 5.25 barrels, the equivalent of $1.81 per ton of limestone. The total advantage of petitioner's deposit is thus $1.98 per ton of limestone.

(m) The business of petitioner may be summarized as the extraction and preparation of its limestone for the market in the form of cement, and, under conditions in California, is strictly comparable with businesses based on metallic mineral deposits, whose operating profits are ordinarily reflected in the valuation of their essential mineral deposits. [7]

(n) During the entire period of operations, beginning in May, 1918, up to the end of 1926, the

profit from operations before depletion of deposits and depreciation of plant averaged $2.185 per ton of limestone.

(o) The residual value of the 1,293 acres of land in which the limestone deposits are located is not over $35.00 per acre, or the aggregate amount of $45,255.00.

(p) The life of the limestone deposits, based upon the actual production, is not over ten years.

(q) The total recoverable profit for the 1,700,000 tons of limestone at $2.185 per ton is $3,714,500.00. The March 1, 1913, value of this profit, discounted under Hoskold's formula at 8% and 4% over a ten year life with a further deferment of five years, is as follows:

Discounted value—10 years—8% and 4%,	$2,274,774
Sound value of plant and equipment	1,000,000
	$1,274,774
Deferment factor—5 years—8%,	.6805832
March 1, 1913, value of limestone,	$ 867,590

(r) The rate of depletion, based upon the foregoing computation, is 48.37 cents per ton, as follows:

March 1, 1913, value of deposit,	$ 867,590
Less residual value of land,	45,255
Depletable value,	$ 822,335
Total tons recoverable,	1,700,000
Depletion rate per ton,	48.37 cents

(s) During 1923, petitioner purchased its own bonds, having a par value of $49,300.00, at a cost of $45,170.00. The difference of $4,130.00, less unamortized bond discount of $360.43, or $3,769.57, was included in 1923 taxable income. [8]

6. Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

(a) That the value of the petitioner's limestone deposits at March 1, 1913, was in excess of $800,000.00, and that the rate of depletion sustained by petitioner on limestone extracted after that date should be computed upon the basis of a total content of 1,700,000 tons, and

(b) That the sum of $3,769.57 included in net income reported for 1923 as profit on petitioner's bonds repurchased during that year should be excluded from taxable income.

(Signed) FREDERICK C. ROHWERDER,
(C. P. A.)
Attorney for taxpayer,
15 Broad Street,
New York, New York.

May 22, 1928. [9]

State of California,
City and County of San Francisco.—ss.

J. A. McCarthy, being duly sworn, says that he is the Vice President of Old Mission Portland Cement Company, the petitioner named in the foregoing petition and as such is duly authorized to verify the foregoing petition and is familiar with the state-

ments therein contained and that the facts therein stated are true.

(Signed) J. A. McCARTHY.

Subscribed to before me this 17th day of May, 1928.

(Signed) JAMES F. McCUE,
Notary Public,
In and for the City and County of San Francisco, State of California. [10]

Exhibit A

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to April 2, 1928.
Old Mission Portland Cement Company,
225 Bush Street,
San Francisco, California.
Sirs:

In accordance with the provisions of Section 279 (a) of the Revenue Act of 1926, there has been assessed against you an income and profits tax amounting to $24,373.34, for the taxable years 1923 to 1926, inclusive, the details of which are set forth in the attached statement.

In accordance with the provisions of Section 274 (a) of the same Act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,
D. H. BLAIR,
Commissioner.
By
C. B. ALLEN.
Deputy Commissioner.

Enclosure:
Statement
Schedules 1 to 21, inclusive. [11]

STATEMENT

April 2, 1928.

IT:CR:G-7
AEW

In re: Old Mission Portland Cement Company,
225 Bush Street,
San Francisco, California.

Year	Deficiency in Tax
1923 (Filed April 14, 1924)	$4,998.64
1924	4,911.59
1925	6,248.15
1926	8,214.86
Total	$24,373.24

In arriving at the above-stated results due consideration has been given the statements set forth in your protest against the findings of the Revenue Agent as outlined in his report dated May 19, 1927, a copy of which has been furnished you.

The adjustments for depletion have been revised in accordance with the report of the Valuation Engineer, copy of which has been submitted to you.

The adjustments producing the above deficiencies are shown in detail in the accompanying schedules 1 to 20, inclusive.

Tax liability of the California Central Railroad Company for 1925 as outlined in Schedule 16, has been made the subject of a separate communication addressed to that corporation. [12]

Old Mission Portland Cement Company

Year ended December 31, 1923

Schedule 1

Net Income

Parent Company

Net Income as disclosed by return		$369,895.27
As corrected		410,260.41
Net adjustment		$ 40,365.14
Unallowable deductions and additional income:		
(a) Donations	$1,002.00	
(b) Depletion	39,363.14	
Total increase as above		$ 40,365.14

Explanation of Items

(a) Donations as listed in Revenue agent's report	$	3,134.51
Not claimed in return		2,132.51
Balance restored to income	$	1,002.00

(b) After due consideration of all data submitted by you, depletion is allowed as follows:

Tons	Rate	Depletion
241,684.29	.03713	$ 8,973.73
Amount claimed in return		48,336.87
Excessive		$ 39,363.14

The rate allowed herein is based upon a March 1, 1913 value of $63,121.00 which is arrived at by discounting the 1920 contract value. [13]

Old Mission Portland Cement Company

Year ended December 31, 1923

Schedule 2

Net Income

California Central Railroad Company

Net income as disclosed by return	$	**6,274.67***
As corrected		**6,650.66**
Net adjustment as shown below	$	375.99

Nontaxable income and additional deductions:

(a) Bond discount, as adjusted in Revenue Agent's Report

*Printer's Note:—Bold face type has been used herein to indicate figures in original record that were typewritten in red.

Schedule 3

Net Income

San Juan Pacific Railway Company

Net income as disclosed by return	$	136.00
As corrected		136.00
Net adjustment	No change	

Schedule 4

Consolidated Net Income

Net Income As Corrected:		
Old Mission Portland Cement Company		$410,260.41
Net Losses as Corrected:		
California Central Railroad Company	$6,650.66	
San Juan Pacific Railway Company	136.00	
Total		6,786.66
Consolidated net income for excess profits tax purposes		$403,473.75

[14]

Old Mission Portland Cement Company

Year ended December 31, 1923

Schedule 5

Computation of Tax

Net income, schedule 4	$403,473.75
Exemption	None

Subject to tax	$403,473.75
Income tax at 12½%	$ 50,434.22
Tax previously assessed	45,435.58
Additional deficiency	$ 4,998.64

Year ended December 31, 1924

Schedule 6

Net Income

Parent Company

Net income as disclosed by return		$457,170.14
As corrected		496,022.56
Net adjustment		$ 38,852.42
Unallowable deductions and additional income:		
(a) Depreciation	$ 5,000.00	
(b) Depletion	34,547.42	
Total		$ 39,547.42
Nontaxable income and additional deductions:		
(c) Donations	$ 70.00	
(d) Amortization	625.00	
Total		695.00
Net adjustment as above		$ 38,852.42

[15]

Old Mission Portland Cement Company

Year ended December 31, 1924

Schedule 6

Explanation of Items

(a) Unamortized Bond Discount is not a depreciable asset. For full explanation see Schedule 1 (d) of the Revenue Agent's report.

(b) Depletion is allowed as explained under Schedule 1 (b) above:

212,116 Tons at .03713	$7,875.87
Deducted in return	42,423.29
Excessive	$34,547.42

(c) and (d) These adjustments are fully explained in Revenue Agent's report.

Schedule 7

Net Income

California Central Railroad Company

Net income as disclosed by return	$ 498.57
As corrected	874.56
Net adjustment	$ 375.99

Nontaxable income and additional deductions:

Amortization of Bond Discount. Computation and explanation shown in detail in Revenue Agent's report.

Schedule 8

Net Income

San Juan Pacific Railway Company

Net income as disclosed by return		$ 331.00
As corrected		331.00
Net adjustment	No change [16]	

Old Mission Portland Cement Company

Year ended December 31, 1924

Schedule 9

Consolidated Net Income

Net Income as Corrected:		
Old Mission Portland Cement Company		$496,022.56
Net Losses as Corrected:		
California Central Railroad Company	$874.56	
San Juan Pacific Railway Company	331.00	
Total		1,205.56
Consolidated net income for excess profits tax purposes		$494,817.00

Schedule 10

Computation of Tax

Consolidated net income, Schedule 9	$494,817.00
Exemption	None
Subject to tax	$494,817.00
Income tax at 12½%	$61,852.13
Tax previously assessed	56,940.54
Deficiency	$ 4,911.59

Schedule 11

Year ended December 31, 1925

Net Income

Parent Company

Net income as disclosed by return		$284,967.05
As corrected		332,530.46
Net adjustment		$ 47,563.41
Unallowable deductions and additional income:		
(a) Donations	$ 2,080.00	
(b) Tax on tax-free bonds	251.82	
(c) Depreciation	5,000.00	
(d) Depletion	40,231.59	
Total as above		$ 47,563.41 [17]

Old Mission Portland Cement Company

Year ended December 31, 1925

Schedule 11—continued

Explanation of Items

(a), (b) and (c) The adjustments are fully explained in the Revenue Agent's report.

(d) As explained under Schedule 1 (b) above depletion is allowed as follows:

247,017 tons at .03713	$ 9,171.74
Claimed in return	49.403.33
Excessive	$40,231.59

Schedule 12

Net Income

Net income as disclosed by return		$ 1,310.13
As corrected		3,456.15
Net adjustment		$ 4,766.28
Unallowable deductions and additional income:		
(a) Amortization Bond Discount	$3,005.19	
(b) Warehouse loss	1,761.09	
Total as above		$ 4,766.28

Explanation

Amortization as shown in Revenue Agent's report	$ 375.99
Amount claimed in return	3,381.18
Difference disallowed	$ 3,005.19

(b) Losses of other years can not be taken as deductions in the taxable year. The warehouse loss in 1913 is, therefore, disallowed as a deduction in 1925. [18]

Old Mission Portland Cement Company

Year ended December 31, 1925

Schedule 13

Net Income

San Juan Pacific Railway Company.

Net income as disclosed by return	$ 520.00
As corrected	520.00

Net adjustment—No change

Schedule 14

Consolidated Net Income

Net Income as Corrected:		
Old Mission Portland Cement Company	$332,530.46	
California Central Railroad Company	3,456.15	
Total		$335,986.61
Net losses as corrected:		
San Juan Pacific Railway Company		520.00
Consolidated net income for excess profits tax purposes		$335,466.61

Schedule 15

Computation of Tax

Net income, Schedule 14	$335,466.61
Exemption	None
Subject to tax	$335,466.61
Income Tax at 13%	$ 43,610.66 [19]

Old Mission Portland Cement Company

Year ended December 31, 1925

Schedule 16

Allocation of Tax

The tax is allocated in accordance with the provisions of Section 240 of the Revenue Act of 1926.

Company	Income	Tax
Old Mission Portland Cement Company	$332,530.46	$43,162.06

California Central Railroad Company	3,456.15	448.60
Totals	$335,986.61	$43,610.66

Deficiencies:

Old Mission Portland Cement Company.

Tax assessed	$36,913.91
Correct tax	43,162.06
Deficiency	$ 6,248.15

California Central Railroad Company.

Tax assessed	None
Correct tax liability	$ 448.60
Deficiency	$ 448.60[20]

Old Mission Portland Cement Company

Year ended December 31, 1926.

Schedule 17

Net Income

Parent Company

Net income as disclosed by return		$245,808.38
As corrected		303,498.84
Net adjustment		$ 57,690.46
Unallowable deductions and additional income:		
(a) Donations	$12,544.14	
(b) Interest	72.73	
(c) Depreciation	5,000.00	
(d) Depletion	40,073.59	
Total as above		$ 57,690.46

Explanation of Items

(a), (b) and (c) These adjustments are fully explained in the Revenue Agent's Report.

(d) As explained under Schedule 1 (b) depletion is allowed as follows:

246,046 tons at .03713	$ 9,135.69
Amount claimed in return	49,209.28
Excessive	$ 40,073.59

Schedule 18

Net Income

California Central Railroad Company

Net income as disclosed by return	$ **4,562.69**
As corrected	**1,402.30**
Net adjustment — Amortization of Bond Discount	$ 3,160.39

Explanation

This adjustment is fully explained in the Revenue Agent's Report. [21]

Old Mission Portland Cement Company

Year ended December 31, 1926

Schedule 19

Net Income

San Juan Pacific Railway Company.

Net income as disclosed by return	$ **320.00**
As corrected	**320.00**

Net adjustment—No Change

Schedule 20

Consolidated Net Income

Net Income as Corrected:		
Old Mission Portland Cement Company,		$303,498.84
Net Losses as Corrected:		
California Central Railroad Company	$1,402.30	
San Juan Pacific Railway Company	320.00	
Total		1,722.30
Consolidated net income for excess profits tax purposes		$301,776.54

Schedule 21

Computation of Tax

Consolidated net income, Schedule 19	$301,776.54
Exemption	None
Subject to tax	$301,776.54
Income tax at 13½%	$ 40,739.83
Tax previously assessed	32,524.97
Deficiency	$ 8,214.86 [22]

EXHIBIT B.

A DISCRIPTION OF CERTAIN LIMESTONE DEPOSITS IN SAN BENITO CO., CALIFORNIA.

Lying on the flanks of the basal granites as exposed by erosion along the axial lines of the Gabilan

Range of mountains, in San Benito County, there are several beds of highly-crystalline limestone that have a more or less East-West strike.

These limestones are the lowest members of the sedimentary formation encountered in this range: also associated with them are the sandstones and shales of the Knoxville (Miocene) series.

But little development has been done on any of these beds. However, the prominent and persistent outcrops, which in places are quite a feature of the country, make it possible to give a rough estimate of the magnitude of these deposits, while analysis has proven their worth and importance in the manufacture of Portland Cement.

The property examined is owned by the Old Mission Portland Cement Company of California. It consists of 2463 acres, of which 1030 comprise the Chittenden Ranch in Santa Cruz County, 10 miles northwest of the town of San Juan and containing vast deposits of argillaceous shale and extensive clay beds, while the limestone deposits, mill-site and water rights are located on the 1433 acres located near the town of San Juan, San Benito County.

DESCRIPTION OF DEPOSITS.

The deposits of limestone dealt within this report are known as (a) The Underwood Deposit, (b) The Flint Deposits and (c) The Gabilan Peak Deposits. These will be taken in detail, in the order named. Also, the practicability of constructing a narrow-gauge electric railway to connect the main line of the California [23] Central Railway at the Under-

wood Quarry with the different deposits on the Flint property and, ultimately, with the Gabilan Peak deposits.

The UNDERWOOD deposit is situated two and a half miles from the site of the Cement mill and is connected with the plant by a railroad built up the canyon of the San Juan Creek. The limestone deposit is located on the north side of the canyon, at an elevation of 600′ above sea level.

The deposit extends from the East line-face of the Barbee Ranch eastward for a distance of 1500′; it has a general strike of N 70E, dipping to the North at an angle of 80 deg. From a point 500′ East of the Barbee fence the line of outcrop is strong and continuous and average 50′ in width, finally feathering out in a small N-S gulch that cuts the axis of the hill opposite the Underwood ranch-house. The outcrop has an average height of 70′ above the level of the canyon at the railway grade.

Towards the West end of the outcrop a crosscut tunnel has been run for a distance of 135′ across the deposit, the face of which is still in limestone; at 75′ from the adit a drift has been run West along the strike of the reef for a distance of 50′. This work exposes a large body of compact and finely-crystalline limestone and proves that at this point, 60′ below the outcrop, the reef is over 135′ in width. There should be about 500,000 tons of limestone available for quarrying in this deposit, above the level of the railway. This amount would be sufficient for the manufacture of 2,000,000 barrels of

cement. Analyses made by Smith, Emery & Co., of San Francisco, show the limestone of the Underwood deposit to contain 96.92% of $CaCO_3$ (Calcium Carbonate).

The FLINT DEPOSITS are situated on the N½ of Section 23, Township 13 South, Range 4 East, a mile and a half from the Underwood property, near the head of Gipsy Rock Canyon, connected with the Underwood by a wagon road and trail. The elevation of the present quarry on the Flint property is 1575′, or 975′ above the railway in San Juan Canyon. This quarry is located on the Middle Deposit or Reef of limestone. The foot of the Lower, or West, reef in Gipsy Rock Canyon is at an elevation of 1300′. Following the strike of the limestone reef to the apex of the hill on the Middle reef a vertical height of 500′ is attained above the foot of the west reef [24] in Gipsy Rock Canyon. The length of the outcrop of this lower reef, from the canyon to the quarry, is about 800′: it has a general strike of N 70 E, dipping North about 75 deg., and an average width of 75′.

From the floor of the quarry on the Middle Reef it strikes for a distance of 400′ N 69 E, dipping to the N. at an angle of 80 deg., and then swings around to N. 27 E., following the axis of the hill for 380′, where the outcrop is covered by wash and debris, about 50′ below the highest point of outcrop. The average width of outcrop of this reef is 130′.

East of the outcrop of the Middle Reef, at an elevation of 1800′, the west end of the East Reef

is exposed, having a width of about 120′. This reef can be traced down the hill to the East for a distance of 1250′ along the strike until it is cut by Limekiln Canyon, at an elevation of 1345′, nearly 500′ below the apex of the outcrop.

The Middle Reef maintains the general strike of N. 70 E. and dips north about 80 deg.

The limestone of these reefs appears to be identical in structure and composition to the rock in the Underwood reef. Analyses show it to contain 93.34% Calcium Carbonate ($CaCO_3$) and 0.60% MgO (Mangesia).

An estimate of the tonnage of limestone available from these three reefs, measured from the outcrop at Marble Falls and following the reef to the apex of the outcrop at an elevation of 1859′, then along the reef to the floor of the Gipsy Rock quarry, an elevation of 1597′, for a total distance of 2226′ is equal to a block of limestone of that length, 261′ deep and 100′ wide: this block will contain 58,198,600 cubic feet of limestone, or 4,849,883 tons.

In addition to this, between the outcrop in Steinbeck Canyon, 257′ below and the Gipsy Rock quarry, there are over a million tons of what may be termed "probable limestone".

The amount actually estimated is sufficient for the manufacture of 19,399,000 barrels of cement, or is equal to the continuous operation of a 2000 barrel plant for 27 years. [25]

The GABILAN PEAK DEPOSITS are situated about two and a half miles directly south of the

Flint Middle Reef at an elevation of 2600′ above sea level. They lie on either flank of the Gabilan Range, an East-West spur of the Coast Range, and culminate in a high escarpment on the East face of Gabilan or Fremont Peak, associated with metamorphic schists, quartzites and coarsely crystalline rocks, the limestone forming the axis of the range at this point.

There are four principal ledges or reefs that can be traced by bold and prominent outcrops for a distance of a mile and a half to the East of the Peak and a mile West, the entire system of reefs having a width of about one mile. Freemont Peak has an elevation of 3250′ above sea level.

On the North slope of the Peak, forming the main peak and the eastern escarpment, there is a reef of limestone 450′ wide. This reef is largely composed of magnesian limstone, having a MgO (Magnesia) content of about 16.41% enclosing two rather shallow beds of coarsely crystalline limestone containing 97.50% of $CaCO_3$, according to the analysis of Emery & Smith.

These reefs and the enclosing rocks have been tilted at high angles, varying between 80 and 87 deg., dipping to the North and having a general strike of N. 70 E.

On the South slope of the main peak there is a reef of fine grained crystalline limestone, about 150′ in width, the outcrop of which can be traced for over a mile to the East, parallel to the North Reef. A deep N-S gulch, cutting the lime reefs

across their strike, along the East base of the peak exposes this reef for a width of nearly 200′ and 500′ below the apex of the outcrop.

Analyses of samples taken across this reef at different points have shown it to be a very pure limestone, containing 97.31% $CaCO_3$ and from 0.38% to 0.88% MgO. The apex of the outcrop of this reef forms what is locally known as the South Peak.

About 200′ below the apex of the South Peak there is a low peak that is formed by a limestone reef having a width of fully 500′. This reef runs practically parallel to the others described and can be traced to Bird Creek, a mile and a half to the East, showing where the wagon road cuts across it a width of 370′. The reef is crossed along its strike by several deep gulches that show faces of limestone from 350′ to 600′ in width and from 75′ to 500′ in height. [26]

Several samples taken from this reef at different points of exposure were analysed by Smith, Emery & Co., and showed results ranging from 91.39 to 97.92% $CaCO_3$ and from 0.40 to 3.08% MgO.

Still farther to the South there is another parallel reef with an outcrop ranging in width from 25′ to 80′. This reef can be traced from half a mile to the East and is apparently formed of a series of unconnected lenses, which die out or are buried as one follows the outcrop Eastward.

It is safe to estimate that the exposures of high grade limestone in these deposits equal the tonnage

estimated to be contained in the Flint Reefs and the Underwood combined, and it is more than probable that development will prove the actual available tonnage to be many times the amount.

THE QUESTION OF TRANSPORTATION OF RAW MATERIAL.

In order to assemble the quarried and broken limestone at a point on the California Central Railway where it can be transported to the cement mill with the minimum cost for handling, it will be necessary to connect the Underwood Limestone Quarry and the Flint deposits by a railroad of some description.

This road can be built from the Underwood place round to Limekiln Canyon and thence up the Canyon to a point on the Flint East Reef. The distance from the Underwood Quarry to the Flint East Reef, by this route, is about 9450′. The gulch at the foot of the reef is 745′ higher than the railway track at the foot of the Underwood quarry. This is equal to a grade of 8.6% for the entire distance. This grade could probably be cut down to 2% by swinging up the hillside, which would add about a third more distance to construction. The road would be constructed on the East side of the ridge that runs North from the Flint property to the South side of the San Juan Canyon as it is easier to gain elevation on this side and the roadbed would always have the benefit of the sunshine. If the East reef is reached by the road at a level of 300′ above the bottom of the gulch at this point,

it will be on a level with the floor of the Flint quarry on the Bird Rock Canyon side. The distance between the two points, round the hill, is about 4500′. If the road were constructed on a plan of this description it would cross the ridge a few feet below the North end of the Middle Reef, which can then be opened as a quarry on both the North and South ends and along the West side. [27] A spur can be run below the track on the West side of the hill to open the West Reef whenever the occasion demanded. There would be 500′ of outcrop (vertical) above the roadbed on the Middle and East Reefs, which can be opened from the same grade with as many working faces as is necessary, and will make it possible to break and handle a much larger daily tonnage and at a consequently smaller per ton cost, than if the deposit were opened from only one side, as at present.

To build the road after this plan would probably mean that at least 20,000′ of construction would have to be undertaken; this would not include sidings in the San Juan Canyon, but would cover the spurs at the quarries.

There are a few physical difficulties in the way of such construction. It would all be side-hill work after Limekiln Canyon was reached, and a minimum of trestle work. The principal expense will be in two or three rock cuts in places where the solid granite comes to the surface, the rest of the work will be in decomposed granite and earth-work.

I am of the opinion that the size of the deposits

and the amount of limestone to be handled could be served better if a road were built to reach these deposits by way of Limekiln Canyon, and that a grade be maintained not exceeding 2.5%. The cost to the R. R. Co., of operation on a road having this grade as a maximum would be very material, as against operating on a higher gradient.

From a point where this road would cross the axis of the ridge below the North end of the Middle Reef, at an elevation of 1600′, it will be possible at any future time to extend it along the East slope to tap the Gabilan Peak reefs at the foot of the East escarpment, an elevation of 2575′. The distance in a direct line is 2½ miles, which is approximately a 7% grade. In order to equalize the grade about four miles of construction would be necessary.

A road can be constructed from the point where the Limekiln Canyon R. R. crosses the axis of the ridge, as explained above, to the top of the bluff overlooking the Underwood Quarry. This road would have to be constructed partially on the West face of the ridge in order to gain the elevation from the point overlooking the quarry. The latter point is 484′ lower than the Middle Reef and 517′ above the R. R. track at the Underwood Quarry. The distance between the two points is 5265′, a 9% grade. From the upper point the different reefs can be reached and opened up as suggested above. [28]

Construction of this type will necessitate the installation of some type of tramway from the point of the bluff to the loading bin on the railroad. The

length of the tramway will be about 1200′, from the top to the bottom of the canyon.

CLAY BEDS. The clay beds from which the Old Mission Portland Cement Company will obtain their supply are located on the Chittenden Ranch, on the north bank of the Pajaro River, 10 miles northwest of San Juan, in Santa Cruz County. The Coast Line of the Southern Pacific Railway, between San Francisco, and Los Angeles, runs through the ranch a few hundred yards from the clay deposits.

The portion of the beds that has been prospected consists of about 30 acres. The clay has been tested to a depth of forty feet by means of shafts and by adjoining oil wells to a depth of 600′.

These clay beds result from the erosion of the Miocene shales that form the hills that lie to the North and East. They have practically the same silica (SiO_2) content but are somewhat higher in alumina (Al_2O_3) and Iron Oxide (Fe_2O_3), due to concentration. Both of these materials are admirably suited for cement making and can be cheaply excavated and easily handled, it being possible to load direct on cars from the beds.

In addition, the numerous oil seeps at different parts of this property, due to the fractured and faulted conditions that exist in the Pajaro River Valley, lead to the belief that careful and systematic drilling will result in the obtaining of fuel oil in commercial quantities.

CONCLUSION. I would say in conclusion that

the property of the Old Mission Portland Cement Company possesses many advantages and will form the basis for an extensive business in the manufacture of Portland Cement and allied products.

The mill is well located, and while the clay has to be hauled ten miles from the Chittenden Ranch it must be borne in mind that only a small proportion of the raw material is included in this, and that the cars that deliver the finished product to the railroad from the mill at that point can return loaded, which materially lessens the cost of transportation. [29]

The Underwood property is admirably situated in regard to transportation and loading facilities. The quarry level will be just above the track, so that the broken limestone can be loaded direct.

The limestone reefs on the Flint land can be easily reached by electric or steam railway, and equally cheap facilities for breaking and handling the rock can be obtained.

The Gabilan deposits constitute a reserve that places beyond all question of doubt the continuous operation of the plant for an indefinite number of years, as far as raw material is concerned.

Respectfully submitted,

(Signed) H. F. COLLETT,
Mining Engineer.

San Francisco Cal.
December 28th, 1911.

[Endorsed]: Filed May 23, 1928. U. S. Board of Tax Appeals. [30]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1.

(2) Admits the allegations contained in paragraph 2.

(3) Admits the allegations contained in paragraph 3.

(4) Denies the respondent erred in the determination of said deficiency as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

(5) Admits the allegations contained in subparagraph (a) of paragraph 5.

Denies the allegations contained in subparagraphs (b) to (g), inclusive, of paragraph 5.

Admits the allegations contained in subparagraph (h) of paragraph 5.

Denies the allegations contained in subparagraphs (i) to (s), inclusive of paragraph 5.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
MAXWELL E. McDOWELL,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Filed Jun 27, 1928. United States Board of Tax Appeals. [31]

[Title of Court and Cause.]

AMENDED PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:G-7-AEW) dated April 2, 1928, and as a basis of its proceedings alleges as follows:

1. The petitioner is a California corporation with its principal place of business at 225 Bush Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on April 2, 1928.

3. The taxes in controversy are income and profits taxes for the calendar years 1923, 1924, 1925, and 1926, and for the aggregate amount of $24,373.24.

4. The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(a) In computing taxable income for each of the years, respondent has erroneously understated the depletion deduction to which petitioner is entitled.

(b) In computing taxable net income for the respective years, respondent has erroneously disallowed as deductions so-called donations made by the petitioner in said years, as follows:

1923	$ 3,134.51
1924	4,963.31
1925	7,957.58
1926	15,851.44 [32]

(c) In computing taxable net income for 1923, respondent has erroneously included therein the sum of $3,769.57, as a profit on redemption of its own bonds during the year at less than par.

(d) In computing net income or loss of the California Central Railroad Company for the respective years, respondent has erroneously disallowed as deductions from gross income the following amounts representing amortization of bond discount, viz:

1923	$3,005.19
1924	3,005.19
1925	3,005.19
1926	3,160.39

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner was incorporated February 10, 1912, under the laws of the State of California, for the purpose of engaging in the manufacture of Portland cement, with a capital of 350,000 shares of common stock of a par value of ten dollars each.

(b) Throughout the years 1923 to 1926, inclusive, petitioner was affiliated as parent company with the California Central Railroad Company and the San Juan Pacific Railway Company, both being California corporations, and filed with the Collector at San Francisco timely consolidated returns for said years.

(c) On August 7, 1912, petitioner acquired for 175,000 shares of its stock the fee title to 2463 acres of land in San Benito, Santa Cruz, and Monterey Counties, California, containing the Barbee, Underwood, and Flint limestone deposits, and an uncompleted cement plant.

(d) Respondent has determined that there were 1,700,000 tons of limestone in said deposits on March 1, 1913, of the value of 3.713 cents per ton and has allowed depletion deductions on said basis throughout the years involved in this appeal.

(e) The quantity of limestone determined by respondent as of March 1, 1913, is agreed to by petitioner. The value thereof was not less than $1.00 per ton on March 1, 1913. [33]

(f) During the years involved in this appeal petitioner in the regular coure of its business paid ordinary and necessary expenses, commonly termed donations, as follows:

1923	$ 3,134.51
1924	5,783.31
1925	8,677.58
1926	15,851.44

In computing net income for the respective years respondent has not allowed any part of said amounts as deductions except $820.00 in 1924 and $720.00 in 1925.

(g) During 1923 petitioner purchased its own bonds of the par value of $49,300.00 for $45,170.00. Respondent has included in income, as determined by him, the difference of $4130.00 less $360.43, representing the unamortized bond discount on said bonds on petitioner's books, or a net amount of $3,769.57.

(h) In 1912 the California Central Railroad Company sold $320,000.00 par value of its bonds at a discount of $135,247.40. Said bonds were to run 40 years and the annual charge-off each year necessary to amortize said discount over said period is $3381.18. During 1923, 1924, and 1925, petitioner owned $284,100.00 par of said bonds and during 1926 it owned $299,100.00 par of said bonds. Respondent has allowed deductions from income for each of the years 1923, 1924, and 1925, in respect of said discount in the sum of $375.99 and for the year 1926 in the sum of $220.79 and has disallowed each year the excess of $3381.18 over these amounts, on the theory that the amortization of discount is not allowable on bonds owned by the parent company.

(i) Petition and its two subsidiaries kept books and rendered their income tax returns on the accrual basis.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and find and hold as follows:

(a) That the value of petitioner's limestone on March 1, 1913, was not less than $1.00 per ton and allow depletion deductions on said basis. [34]

(b) That petitioner's net income for the respective years should be reduced by the so-called donations as contended herein.

(c) That petitioner's 1923 net income should be reduced by the amount of $3,769.57, which respondent has included therein as a profit on redemption of its own bonds at less than par.

(d) That consolidated net income for each year should be reduced by the amount of the bond discount allowable to the California Central Railroad Company as alleged herein, which respondent has disallowed.

(e) That the consolidated net income should be redetermined for each year in the light of the foregoing findings and the tax liability and deficiencies recomputed accordingly,

and grant such further relief as petitioner is entitled to or which to the Board may seem equitable and proper.

(Sgd.) FREDERICK C. ROHWERDER, C.P.A.
Attorney for Petitioner.
Address. 15 Broad Street, New York, N. Y. [35]

VERIFICATION

State of California
City and County of San Francisco—ss.

J. A. McCarthy, being duly sworn, says that he is the Vice President of the Old Mission Portland Cement Company, petitioner above named; that he has read the foregoing Amended Petition or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Signed) J. A. McCARTHY

Subscribed and sworn to before me this 21st day of January, 1931.

[Seal] (Signed) W. W. HEALLEY,
Notary Public, in and for the City and County of San Francisco, State of California. My commission expires August 29, 1933. [36]

EXHIBIT "A"

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and refer to April 2, 1928.
Old Mission Portland Cement Company,
225 Bush Street,
San Francisco, California.

Sirs:

In accordance with the provisions of Section 279(a) of the Revenue Act of 1926, there has been assessed against you an income and profits tax amounting to $24,373.34, for the taxable years 1923 to 1926, inclusive, the details of which are set forth in the attached statement.

In accordance with the provisions of Section 274(a) of the same Act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,

D. H. BLAIR, Commissioner.

By C. B. ALLEN, Deputy Commissioner.

Enclosure: Statement Schedules 1 to 21, inclusive.

[37]

STATEMENT

IT:CR:G-7 April 2, 1928

AEW

In re: Old Mission Portland Cement Company, 225 Bush Street, San Francisco, California.

Year	Deficiency in Tax
1923 (Filed April 14, 1924)	$ 4,998.64
1924	4,911.59
1925	6,248.15
1926	8,214.86
Total	$24,373.24

In arriving at the above-stated results due consideration has been given the statements set forth in your protest against the findings of the Revenue Agent as outlined in his report dated May 19, 1927, a copy of which has been furnished you.

The adjustments for depletion have been revised in accordance with the report of the Valuation Engineer, copy of which has been submitted to you.

The adjustments producing the above deficiencies are shown in detail in the accompanying Schedules 1 to 20, inclusive.

The tax liability of the California Central Railroad Company for 1925 as outlined in Schedule 16, has been made the subject of a separate communication addressed to that corporation.

Year ended December 31, 1923

Schedule 1

Net Income

Parent Company

Net income as disclosed by return		$ 369,895.27
As corrected		410,260.41
Net adjustment		$ 40,365.14
Unallowable deductions and additional income:		
(a) Donations	$1,002.00	
(b) Depletion	39,363.14	
Total increase as above		$ 40,365.14

Explanation of Items

(a)	Donations as listed in Revenue Agent's report	$ 3,134.51
	Not claimed in return	2,132.51
	Balance restored to income	$ 1,002.00
(b)	After due consideration of all data submitted by you, depletion is allowed as follows:	

Tons	Rate	Depletion
241,684.29	.03713	$ 8,973.73
Amount claimed in return		48,336.87
Excessive		$39,363.14 [38]

The rate allowed herein is based upon a March 1, 1913 value of $63,121.00 which is arrived at by discounting the 1920 contract value.

Schedule 2

Net Income

California Central Railroad Company

Net income as disclosed by return	($6,274.67)
As corrected	(6,650.66)
Net adjustment as shown below	$ 375.99
Nontaxable income and additional deductions:	
(a) Bond discount, as adjusted in Revenue Agent's report	

Schedule 3

Net Income

San Juan Pacific Railway Company

Net income as disclosed by return	($136.00)
As corrected	($136.00)
Net adjustment	No change

Schedule 4

Consolidated Net Income

Net Income as Corrected:		
Old Mission Portland Cement Company		$ 410,260.41
Net Losses as Corrected:		
California Central Railroad Co.	$6,650.66	
San Juan Pacific Railway Co.	136.00	
Total		6,786.66
Consolidated net income for excess profits tax purposes		$ 403,473.75

Schedule 5

Computation of Tax

Net income, Schedule 4	403,473.75
Exemption	None
Subject to tax	$ 403,473.75
Income tax at 12½%	50,434.22
Tax previously assessed	45,435.58
Additional deficiency	$ 4,998.64 [39]

Year ended December 31, 1924

Schedule 6

Net Income

Parent Co.

Net income as disclosed by return		$457,170.14
As corrected		496,022.56
Net adjustment		$ 38,852.42
Unallowable deductions and additional income:		
(a) Depreciation	$ 5,000.00	
(b) Depletion	34,547.42	
Total		39,547.42
Nontaxable income and additional deductions:		
(c) Donations	$ 70.00	
(d) Amortization	625.00	
Total		695.00
Net adjustment as above		$ 38,852.42

Explanation of Items

(a) Unamortized Bond Discount is not a depreciable asset. For full explanation see Schedule 1(d) of the Revenue Agent's report.

(b) Depletion is allowed as explained under Schedule 1(b) above:

212,116 Tons at .03713	$ 7,875.87
Deducted in return	42,423.29
Excessive	$ 34,547.42

(c) and (d) These adjustments are fully explained in Revenue Agent's report.

Schedule 7

Net Income

California Central Railroad Co.

Net income as disclosed by return	($ 498.57)
As corrected	(874.56)
Net adjustment	$ 375.99

Nontaxable income and additional deductions:

Amortization of Bond Discount. Computation and explanation shown in detail in Revenue Agent's report.

Schedule 8

Net Income

San Juan Pacific Railway Co.

Net income as disclosed by return	(331.00)
As corrected	(331.00)
Net adjustment	No change [40]

Year ended December 31, 1924

Schedule 9

Consolidated Net Income

Net income as Corrected:	
Old Mission Portland Cement Co.	$ 496,022.56
Net losses as corrected:	
California Central Railroad Co. $874.56	
San Juan Pacific Railway Co. 331.00	
Total	1,205.56
Consolidated net income for excess profits tax purposes	$ 494,817.00

Schedule 10

Computation of Tax

Consolidated net income, Schedule 9	$ 494,817.00
Exemption	None
Subject to tax	$ 494,817.00
Income tax at 12½%	61,852.13
Tax previously assessed	56,940.54
Deficiency	$ 4,911.59

Year ended December 31, 1925

Schedule 11

Net Income

Parent Company

Net income as disclosed by return		284,967.05
As corrected		332,530.46
Net adjustment		$ 47,563.41
Unallowable deductions and additional income:		
(a) Donations	$2,080.00	
(b) Tax on tax-free bonds	251.82	
(c) Depreciation	5,000.00	
(d) Depletion	40,231.59	
Total as above		47,563.41

Explanation of Items

(a), (b), and (c). The adjustments are fully explained in the Revenue Agent's report.

(d) As explained under Schedule 1(b) above depletion is allowed as follows:

247,017 tons at .03713	$ 9,171.74
Claimed in return	49,403.33
Excessive	$ 40,231.59 [41]

Schedule 12

Net Income

Net income as disclosed by return		($ 1,310.13)
As corrected		3,456.15
Net adjustment		4,766.28
Unallowable deductions and additional income:		
(a) Amortization Bond Discount	$3,005.19	
(b) Warehouse loss	1,761.09	
Total as above		$ 4,766.28

Explanation

Amortization as shown in Revenue Agent's report	$ 375.99
Amount claimed in return	3,381.18
Difference disallowed	$ 3,005.19

(b) Losses of other years can not be taken as deductions in the taxable year. The warehouse loss in 1913 is, therefore, disallowed as a deduction in 1925.

Schedule 13

Net Income

San Juan Pacific Railway Company

Net income as disclosed by return	($ 520.00)
As corrected	(520.00)
Net adjustment--No change	

Schedule 14

Consolidated Net Income

Net income as corrected:		
Old Mission Portland Cement Company	$332,530.46	
California Central Railroad Company	3,456.15	
Total		$335,986.61
Net losses as corrected:		
San Juan Pacific Railway Co.		520.00
Consolidated net income for excess profits tax purposes		$335,466.61

Schedule 15

Computation of Tax

Net income, Schedule 14	335,466.61
Exemption	None
Subject to tax	$335,466.61
Income tax at 13%	$ 43,610.66 [42]

Year ended December 31, 1925

Schedule 16

Allocation of Tax

The tax is allocated in accordance with the pro-

visions of Section 240 of the Revenue Act of 1926.

Company	Income	Tax
Old Mission Portland Cement Company	$332,530.46	$ 43,162.06
California Central Railroad Company	3,456.15	448.60
Totals	335,986.61	43,610.66

Deficiencies:

Old Mission Portland Cement Company.	
Tax assessed	$36,913.91
Correct Tax	43,162.06
Deficiency	6,248.15
California Central Railroad Company.	
Tax assessed	None
Correct Tax liability	$ 448.60
Deficiency	$ 448.60

Year ended December 31, 1926.

Schedule 17

Parent Company

Net income as disclosed by return		$ 245,808.38
As corrected		303,498.84
Net adjustment		$ 57,690.46
Unallowable deductions and additional income:		
(a) Donations	$12,544.14	
(b) Interest	72.73	

(c)	Depreciation	5,000.00
(d)	Depletion	40,073.59
	Total as above	$ 57,690.46

Explanation of Items

(a), (b), and (c) These adjustments are fully explained in the Revenue Agent's report.

(d) As explained under Schedule 1(b) depletion is allowed as follows:

246,046 tons at .03713	$ 9,135.69
Amount claimed in return	49,209.28
Excessive	$ 40,073.59 [43]

Year ended Dec. 31, 1926

Schedule 18

Net Income

California Central Railroad Company.

Net income as disclosed by return	(4,562.69)
As corrected	(1,402.30)
Net adjustment—Amortization of Bond Discount	$ 3,160.39

Explanation

This adjustment is fully explained in the Revenue Agent's Report.

Schedule 19

Net Income

San Juan Pacific Railway Company.

Net income as disclosed by return	($320.00)
As corrected	(320.00)
Net adjustment—No change	

Schedule 20

Consolidated Net Income

Net income as corrected:		
Old Mission Portland Cement Company		$ 303,498.84
Net Losses a Corrected:		
Calif. Central Railroad Company	$1,402.30	
San Juan Pacific Railway Co.	320.00	
Total		1,722.30
Consolidated net income for excess profits tax purposes		$ 301,776.54

Schedule 21

Computation of Tax

Consolidated net income, Schedule 19	301,776.54
Exemption	None
Subject to Tax	$ 301,776.54
Income tax at 13½%	40,739.83
Tax previously assessed	32,524.97
Deficiency	$ 8,214.86

[Endorsed]: Filed at Hearing Feb. 5, 1931. U. S. Board of Tax Appeals. [44]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the amended petition.

2. Admits all the material allegations contained in paragraph 2 of the amended petition.

3. Admits all the material allegations contained in paragraph 3 of the amended petition, except the allegation as to the amount of the tax in controversy and denies that the amount of tax in controversy is the amount shown in paragraph 3 of the amended petition.

4—(a), (b), (c) & (d). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4—(e). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated April 2, 1928.

5—(a). Admits all the material allegations contained in subparagraph (a) of paragraph 5 of the amended petition. [45]

5—(b). Denies all the material allegations contained in subparagraph (b) of paragraph 5 of the amended petition, except the allegation that throughout the years 1923 to 1926, inclusive, petitioner was affiliated as parent company with the California Central Railroad Company and the San Juan Pacific

Central Railroad Company and the San Juan Pacific Railway Company, both being California corporations and filed with the Collector of Internal Revenue consolidated returns for said years.

5—(c). Denies all the material allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

5—(d). Admits all the material allegations contained in subparagraph (d) of paragraph 5 of the amended petition.

5—(e), (f) & (g). Denies all the material allegations contained in subparagraphs (e), (f) and (g) of paragraph 5 of the amended petition.

5—(h). Admits the allegation that the respondent has allowed as a deduction in determining the income or loss of the California Central Railroad Company for each of the years 1923, 1924, 1925 and 1926 of $375.99, $375.99, $375.99 and $220.79, respectively, representing bond discount, and the allegation that the petitioner during each of the years 1923, 1924 and 1925 owned $284,100, face value, and during the year 1926 owned $299,100, face value, of bonds issued by the California Central Railroad Company, and denies all the remaining material allegations contained in said subparagraph (h) of paragraph 5 of the amended petition. [46]

5—(i). Denies all the material allegations contained in subparagraph (i) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the petitioner's amended petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
J. ARTHUR ADAMS,
Special Attorney, Bureau of Internal Revenue.

[Endorsed]: U. S. Board of Tax Appeals. Filed at Hearing Feb. 5, 1931. [47]

[Title of Court and Cause.]

FINDINGS OF FACT AND OPINION.

1. The respondent's determination of the March 1, 1913, fair market value of petitioner's limestone deposits for depletion purposes sustained.

2. The deductibility of alleged business expenses, designated as "contributions, subscriptions or donations", determined.

3. The amount of the amortization of bond discount on bonds issued by an affiliated corporation and held by petitioner is not deductible in computing consolidated net income.

George E. H. Goodner, Esq., and Frederick C. Rohwerder, C. P. A., for the petitioner.

J. A. Adams, Esq., for the respondent.

The Commissioner determined deficiencies in the petitioner's income and profits taxes for the years and in the amounts as follows:

1923	$4,998.64
1924	4,911.59
1925	6,248.15
1926	8,214.86

[48]

The petitioner alleges that the Commissioner's determination is based upon the following errors:

(a) In computing taxable net income for each of the years, respondent has erroneously understated the depletion deduction to which petitioner is entitled.

(b) In computing taxable net income for the respective years, respondent has erroneously disallowed as deductions so-called donations made by petitioner in said years, as follows:

1923	$3,134.51
1924	4,963.31
1925	7,957.58
1926	15,851.44

(c) In computing taxable net income for 1923, respondent has erroneously included therein the sum of $3,769.57, as a profit on redemption of its own bonds during the year at less than par.

(d) In computing net income or loss of the California Central Railroad Company for the respective years, respondent has erroneously disallowed as deductions from gross income the following amounts representing amortization of bond discount, viz:

1923	3,005.19
1924	3,005.19
1925	3,005.19
1926	3,160.39

FINDINGS OF FACT.

The petitioner is a corporation, organized under the laws of California on February 10, 1912, for the purpose of engaging in the manufacture of Portland cement. Its principal office is at San Francisco. Its capital stock consists of 350,000 shares of common stock of the par value of $10 per share. [49]

The San Juan Portland Cement Company was organized in 1906, at which time it acquired the Barbee, Underwood, and Flint limestone deposits involved in this proceeding. These deposits were located about 88 miles south of San Francisco and about 7 miles from the Southern Pacific Railway, which was reached by a connecting railway known as the San Juan Pacific Railway Company whose stock was owned by the San Juan Portland Cement Company. Machinery for a cement plant was ordered and some of it delivered and set up at the plant site prior to 1912 when the company encountered financial difficulties due to dissension among the promotors of the enterprise. In 1912, the company defaulted in the payment of interest upon its bonds outstanding in the amount of $1,300,000. A committee representing the owners of these bonds instituted foreclosure proceedings and purchased the assets of the San Juan Portland Cement Company at the Sheriff's sale for $20,700, the actual costs of the sale, etc. The bondholders' committee thereby acquired all of the assets of the San Juan Portland Cement Company, consisting of stock and bonds of the San Juan Pacific Railway Company,

the unfinished cement plant, the Chittenden Ranch, and the above mentioned limestone deposits. Shortly thereafter, the bondholders' committee organized the California Central Railroad Company and turned over to that company the stocks and bonds of the San Juan Pacific Railway Company in exchange for its stock and bonds.

The petitioner was then organized and in exchange for 175,000 shares of its common stock of the par value of $10 per share acquired from the bondholders' committee the unfinished cement plant, machinery, equipment, etc., which were valued at approximately $500,000, and the above mentioned tracts, containing 2,463 acres of land. In 1916, the petitioner made the [50] necessary financial arrangements, procured capable management, and undertook the completion of its cement plant. The plant was finished at an additional cost of about $500,000 and production started in 1918.

The Barbee deposit was adjacent to the plant; the Underwood and Flint deposits were two and three miles, respectively, from the plant and were reached by a narrow gauge railroad constructed after 1913 and extended as operations progressed after 1918. The deposits were exhausted in or about 1927.

On December 19, 1922, the petitioner filed with the Commissioner Form F "Schedules for Substantiation of Valuation, Depletion, and Depreciation—Inorganic Nonmetallic Mineral Properties," on which these limestone deposits, comprising "1293 acres of surface (fee) containing mineral," were

valued for depletion purposes at $1,034,398.10. Attached to Form F was a letter of explanation which contained, inter alia, the following:

> * * * the book entries covering the transfer [that is, the acquisition from the bondholders' committee] of the aforementioned properties are:
>
> | | |
> |---|---|
> | Lands | $1,202,653.10 |
> | Uncompleted Cement Plant | 545,346.90 |
> | Organization and Development | 2,000.00 |
> | | $1,750,000.00 |
>
> The Underwood property has been practically depleted of lime rock since early in 1920, but still contains sufficient clay to supply the Mill at its present capacity for a number of years. Both lime rock and clay are necessary to the manufacture of Portland Cement.
>
> The Barbee property contains no high grade limestone but considerable clay similar to that of Underwood.
>
> The Flint property is now supplying the lime rock used at the Plant. From development work done in 1918 the available tonnage was estimated as sufficient to run the Mill for eight years. [51]
>
> We started to use the material in March, 1921, but from present indications it would seem that the supply will be exhausted in another five years—that is in say, 6½ years from March, 1921.

From March, 1920, when Underwood was exhausted until March, 1921, when arrangements were completed to enable us to draw upon Flint, lime rock was obtained from the property of Judge E. A. Pearce of San Juan.

For the purpose of depletion the Plant Site acreage which we estimate to be worth $48,000, may be eliminated. The Chittenden Ranch, eight miles from the Plant was bought principally for the Clay beds and Oil prospects. The Clay is unnecessary, as equally good material can be obtained from Underwood and Barbee, which are much nearer the Mill; and, concerning the Oil, nothing has been done so far to prove its existence. We suggest, therefore, that the Ranch be also omitted in computing the cost of mineral lands until we begin to draw upon its resources. Our estimate of its value for agricultural purposes is $75,000. which includes the buildings.

The cost therefore of the mineral lands bought on August 7th, 1912, would be:

Land		1,202,653.10
Less:		
Plant Site	48,000.	
Chittenden Ranch	75,000.	123,000.00
		1,079,653.10

The Company commenced to quarry for Rock and Shale in April, 1918, and commenced Mill Operation on May 1st of the same year. The output to December 31st, 1912 [sic] has been:

	Tons
Underwood and Vicinity	203,586.81
E. A. Pearce—on royalty basis	50,093.50
Flint	75,656.81
	329,337.12

The estimated life of Flint is: 6½ years
We commenced to take out Rock in March, 1921, which gives an elapsed time to December 31, 1921: ¾ "

Leaving probable life from 5¾ "
During this period of 5¾ years the Mill will require at its present capacity, Rock and Shale: 1,035,000.00

1,364,337.12
Deduct Rock taken from Pearce property 50,093.50

Estimated commercial tonnage 1,314,243.62

[52]

If we figure the residual value of the land at $35.00 per acre, we get:

Rock Cost less Plant Site and Ranch	1,079,653.10
1293 acres at 35.00 per acre	45,255.00
	$1,034,398.10

which divided by 1,314,244 tons gives a depletion rate of nearly 79 cents a ton.

On September 23, 1912, the Company pur-

chased the mineral rights to 8750 acres on the El Gabilan Rancho for 50,000 shares of Common Stock. This land is about three miles beyond the Flint property in a mountainous district inaccessible except by pack mule and of no use for Cement making purposes until a suitable means of transportation has been provided. Work is now being done with a view to estimating the useful tonnage available, and we hope to find sufficient rock to meet the Company's requirements for the remainder of its corporate life.

The Company will either have to go to Gabilan within the next few years, purchase new deposits, or go out of business. The question is whether depletion is to be figured only on the deposits bought in August, 1912, or whether we should endeavor to reach a rate that would cover the Gabilan deposits also.

If the Company goes to Gabilan, as in all probability it will, we would suggest that we allow for 25% increase in the capacity of the Mill, and figure depletion over an assumed corporate life of 40 years from May 1st, 1918. Under these conditions, we would get a tonnage of:

	Tons
Commercial tonnage from original purchase to Sept. 30th, 1927 as shown above:	1,314,244
Allowing for an increase of 25% in production, the Rock and Shale re-	

quired from Sept. 1927 to April 30th, 1958, would be 220,000 tons a year.
220,000 tons X 30 years and 7 months: 6,728,333

Estimate total tonnage required during 40 years from May 1st, 1918 8,042,577

We make no attempt to forecast the value of the Gabilan mineral rights after 40 years—there is the possibility that substitute for Portland Cement may be developed, or that something else may arise to depreciate its value. [53]

If the depletion rate be based on the cost of the entire deposits spread over a life of 40 years, we get:

Cost of original properties less plant Site, Ranch and residual value 1,034,398.10
Gabilan Mineral Rights 500,000.00

1,534,398.10

which divided by the commercial tonnage required, viz: 8,042,577 gives a rate of over 19 cents per ton.

Should the Company decide that it would not go to Gabilan, a rate of 79 cents per ton would have to be applied to write off the original quarry lands by September, 1927. Should the Commissioner decide that this figure is too much to allow under the heading of Depletion, the Company will have to adjust the difference in some other way.

In sizing up the general situation we have reached a conclusion that the rate taken over the entire deposits should be about 20 cents a

ton. We submit this figure for your consideration, and would be glad to receive your opinion as early as possible, that we may make whatever adjustments are necessary before closing the books.

Upon its income tax returns for the years 1918, 1919, 1920, and 1921, the petitioner claimed deductions for depletion of mineral deposits at the rate of 10 cents per ton. Upon its income-tax returns for the years 1922, 1923, 1924, 1925, and 1926, the petitioner claimed deductions for depletion of mineral deposits at the rate of 20 cents per ton, basing this rate on the data furnished in Form F referred to above.

The Commissioner determined the March 1, 1913, value of the petitioner's limestone deposits at $63,121, and the tonnage therein of 1,700,000 tons. Upon this basis the Commissioner has allowed deductions for depletion of mineral deposits at the rate of 3.713 cents per ton.

The amount of limestone produced from the Barbee, Underwood, and Flint deposits, the deductions for depletion claimed by the petitioner and [54] allowed by the Commissioner, for the taxable years under consideration, are as follows:

Year	Tons Produced	Depletion Claimed at 20 cents per ton	Depletion allowed at 3.713 cents per ton
1923	241,684.35	$48,336.87	$8,973.73
1924	212,116	42,423.29	7,875.87
1925	247,016.67	49,403.33	9,171.74
1926	246,046.40	49,209.28	9,135.69

During the years under consideration the petitioner made the following expenditures, designated as "contributions, subscriptions or donations," which have not been allowed as deductions:

	1923	1924	1925	1926
1. San Francisco Community Chest	$1,000.00	$1,000.00	$1,000.00	$1,000.00
2. Cement to San Juan Mission	472.38			
3. " " " " Memorial	10.13			
4. Mills College	150.00			
5. John Bryan	100.00			
6. Working Girls Aid	5.00	10.00	10.00	10.00
7. Californians, Inc.	1,000.00	1,000.00	1,000.00	1,000.00
8. Japanese Relief	250.00			
9. Municipal Railway Ball	2.00	10.00	10.00	10.00
10. American Legion Com.	100.00	96.50		
11. Cash	10.00			
12. West Coast Veterans	25.00	20.00		
13. St. Francis Girls Directory	10.00			
14. Police Ball		5.00	5.00	
15. Mooseheart Governors (School)		50.00	25.00	
16. Mission Dolores		100.00		
17. Athletic Fund		25.00		
18. Mills Bldg. Employees		105.00		
19. Firemen		35.00	30.00	5.00
20. News Boys		5.00	20.00	15.00
21. Letter Carriers		5.00	5.00	5.00
22. Munstermen		25.00	25.00	
23. St. Patricks Church		20.00	70.00	
24. British Fleet		26.02		
25. U. S. Govt. Research		29.00		
26. Olympiad (Adv.)		300.00		
27. Narcotic Crusade		25.00		
28. L. R. Lurie		250.00		
29. Coolidge Campaign		250.00		

	1923	1924	1925	1926
30. P. L. Ryan		150.00		
31. Monitor Publishing Co.		25.00		[55]
32. Jap. Fleet		$50.00		
33. Industrial Assn. of San Francisco		300.00	1,800.00	1,800.00
34. Olympic Games		200.00		
35. San Francisco Opera Assn.		250.00		
36. Cement to Highway Com. (Samples)		6.54		
37. " " Citizens Military Tr. Camp		77.50		25.00
38. " " San Juan Com. Hall		73.75		
39. " " McGillibvray Cons. Co.		367.90		
40. Cement Donated		71.10	111.27	1.30
41. " to Cal. C. C. Los Gatos			847.85	
42. St. Leo's Rectory			25.00	
43. American Fleet			50.00	
44. Emporium			2.10	
45. San Juan Cemetery Cement			5.63	
46. Cement—Native Daughters			.84	
47. St. Josephs Hospital			500.00	
48. American Bankers League			25.00	
49. 30th Infantry			25.00	
50. Legion News			25.00	
51. Diamond Jubilee			82.00	
52. Switchmens Union			10.00	10.00
53. Labor Council			25.00	50.00
54. Happyland Fund (Ad)			10.00	5.00
55. Fremont Peak Flag Pole			609.33	
56. Calif. Mineral Assn.			10.00	
57. Childrens Hospital			250.00	
58. Marin Co. "Good Roads" (Ad)			250.00	
59. Election Donation			10.00	
60. Cement to S. McCarthy			1,058.56	
61. E. Sonetter, Christmas			25.00	
62. Sixty Sixth Coast Artillery				10.00
63. St. Francis School				91.88

	1923	1924	1925	1926
64. Veteran Firemen				25.00
65. Elks Golden Jubilee Conv.				10.00
66. State Highway Patrol				80.00
67. Federal Employees				10.00
68. Mission Restoration				250.00
69. Valley Bldg. Matl. Co. (Gypsum)				3.54
" " " " et al., Cement				77.68
70. Ricard Historical Fund (Santa Clara Univ.)				100.00
71. John McLaren Fund				90.00
72. Mrs. Carlson				25.00
73. Sausalito Fire Alarm				5.00
74. Republican Campaign				500.00
75. Calif. National Guard				10.00
76. Boy Scouts San Juan				25.00
77. Presbyterian Church—Hollister				50.00
78. Red Cross San Juan				25.00
79. San Francisco Bulletin				25.00
				[56]
80. Y. M. C. A.				$2,500.00
81. Master Plasters				100.00
82. California Concrete Pipe Mfrs.				300.00
83. All California Highway Lobbying				3,000.00
84. Stanford University				4,000.00
85. Valley Lbr. Co. Cement				4.76
86. Keystone Const. Co. Cement				196.90
87. John O. Loftgrist Cement				400.38
Total	$3,134.51	$4,963.31	$7,957.58	$15,851.44

Petitioner operated under a budget and when the appropriation for any department was exhausted, further expenditures within that year were charged to some other account. In this manner some advertising expense was charged to "contributions, subscriptions or donations." As a matter of business

policy the petitioner contributed to organizations and enterprises that benefited the community, believing that such contributions to the community welfare resulted in good will toward petitioner and increased its business.

Item 1. The San Francisco Community Chest, like Community Chest organizations in other cities, represented the several charitable organizations of the city and gifts to the Community Chest were apportioned among these organizations. Publicity through the newspapers and by means of placards on doors was given to the contributors.

Items 2, 16, and 68, represent contributions of cement for the restoration of old missions in California, some of which date back to the Spanish days. These missions were of adobe construction and were in bad condition due somewhat to the earthquake disasters at San Francisco and Santa Barbara. The San Juan Mission and the petitioner's plant were located in the same town and the Mission Dolores was in San Francisco, [57] where petitioner sold most of its product. Some of petitioner's employees attended services in the San Juan Mission.

Item 4. This contribution was made to the Mills College building campaign for the purpose of procuring the order for some of the cement to be used in the new construction at the college. Petitioner procured the order for the cement.

Item 5. John Bryan owned land over which petitioner desired an easement. Bryan requested a contribution from petitioner for a pageant at Hollister, about eight miles from San Juan. Petitioner con-

tributed $100 for this purpose through Bryan, who granted favors to the petitioner from time to time.

Items 6, 8, 12, 15, 27, 42, 44, and 46, were charitable gifts.

Item 7. Californians, Inc., is an organization for advertising the State of California with particular reference to the San Francisco Bay district. Industrial and business interests of the State supported the enterpise which by means of nation-wide advertising and publicity attracted people and industries to California. Petitioner did not have an individual advertisement in "Californians," the publication of the organization.

Items 9, 14, 20, 21, and 52, were either the purchase of tickets or donations.

Item 10. Several of petitioner's employees were members of the American Legion and it was considered advisable to make these contributions.

Items 13, 26, 31, 50, 54, and 58, were advertising expense. [58]

Item 18. Petitioner moved its offices from the Mills Building and gave this sum to the employees of that building so that they would direct people to petitioner's new location.

Item 23 represents contributions to the Catholic Church which was very strong in California and which had a large building program.

Items 24, 32, and 43 were contributions for the celebrations and entertainments for the fleets during their stay at San Francisco. These celebrations advertised the city but did not directly benefit the petitioner.

Item 28 is a gift to Lurie for services rendered the petitioner in procuring business. He specified the petitioner's cement on various jobs.

Items 29, 59, and 74 were contributions to political campaigns.

Item 30 is a contribution to a religious organization to which petitioner sold cement.

Item 33. The petitioner and allied industries organized the Industrial Association of San Francisco to combat the labor unions that were in control of the building trades. The labor unions had established yards for supplying building materials and were importing foreign cement which competed with the petitioner's product. The petitioner's business was affected by the activities of the labor unions and benefited by a cessation of such activities.

Item 34 is a contribution toward the expenses of athletes going to Europe for the Olympic games.

Item 35 is a contribution to the expense of providing operas at the San Francisco Civic Auditorium at a nominal cost to the individual.

Item 36 represents the cost of cement samples sent to the Highway Commission for special tests. Petitioner sold cement to the Highway [59] Commission and supplied these samples from time to time.

Item 37. Some of petitioner's employees were interested in the Citizens Military Training Camp and petitioner gave cement for use in fixing up headquarters at the camp.

Item 38. Petitioner contributed cement for the building of the Community Hall which was a direct benefit to its employees.

Item 41. Petitioner contributed cement to the California Central College at Los Gatos for the purpose of creating friendly relations and obtaining new business. Petitioner subsequently sold cement to the institution.

Item 47. This contribution was made to obtain business from St. Joseph's Hospital which had a large building program. Petitioner received a share of the business.

Item 51 is a contribution to a San Francisco celebration.

Item 55 represents a contribution for the marking of Fremont's Peak, of historical interest in California, and the celebration of Native Sons and Daughters.

Item 80 is a contribution to the building of the Army and Navy Y. M. C. A. in San Francisco.

Item 82. The members of this association were petitioner's customers and this contribution was made for the purpose of keeping their business.

Item 83 is a contribution to a state-wide referendum for increasing the gasoline tax for the purposes of road building. The referendum was successful and the State of California undertook a large road building program, involving the use of cement and other materials.

Item 84. This contribution to Stanford University was for the purpose of making a study of con-

struction involving the use of cement. [60] The University had the facilities and technical staff and could extend its research in the various fields, thereby doing experimental work of great value to the cement and other industries supplying materials for building construction.

Contributions of cement were entered upon the petitioner's books at the sales price, less the allowance for containers returned, and were credited to sales and charged to donations, etc.

The California Central Railroad Company was organized under the laws of California in 1912, at which time it acquired in exchange for its stock and bonds all of the assets of the San Juan Pacific Railway Company, a California corporation organized prior to 1912. During the taxable years under consideration the petitioner was affiliated with the two railroad companies. The books of the three companies were kept, and consolidated income-tax returns filed, on the accrual basis.

In 1912, the California Central Railroad Company issued its own bonds at a discount. In amortizing this bond discount over the life of the bonds the amount of amortization applicable to each of the four years under consideration is $3,381.18. In computing the consolidated net income for the respective years, the Commissioner has allowed as a deduction for bond discount the sum of $375.99 in the years 1923, 1924, and 1925, and $220.79 in the year 1926. The balance applicable to each of these years, disallowed by the Commissioner, represents the amortization of bond discount applicable to

bonds owned by the petitioner during these years. [61]

OPINION.

SMITH. The principal issue for our determination is the fair market value of the petitioner's limestone deposits, designated as the Barbee, Underwood, and Flint deposits, on March 1, 1913, which the petitioner acquired prior to that date in the manner set forth in our findings of fact. The facts relating to the acquisition of these properties are not in dispute, and the petitioner concedes the correctness of the respondent's determination of the estimated tonnage on the basic date. The respondent determined the March 1, 1913, value of these deposits to be $63,121, estimated the tonnage thereof at 1,700,000 tons, and allowed depletion deductions at the rate of 3.713 cents per ton upon the stone removed during the taxable years 1923 to 1926, inclusive. The petitioner claimed deductions for depletion upon its income-tax returns for the taxable years under consideration at the rate of 20 cents per ton, which rate is explained on brief as "a charge spread over all its holdings and was not restricted to the Barbee, Underwood and Flint deposits." The petitioner contends that the March 1, 1913, value of these deposits was not less than $1 per ton, and in support of this valuation offered opinion evidence by three men experienced in the cement industry.

The petitioner's first witness, Ira Judson Coe, testified that he had been interested in California limestone properties since 1903 and that as a con-

sulting engineer he had examined practically all such deposits in that State. Between 1904 and 1906 he examined the properties involved in this proceeding, and, finding them suitable for cement production, recommended operations thereon. On direct examination Coe stated that in 1906 he valued the limestone in place on these properties at $1,000,000, and later stated that he probably did not place a valuation upon the properties at that time, but made a recommendation as to "the value or [62] I would not have recommended the investment." The interests that he represented put about $300,000 into the development of these properties at that time, and, according to Coe, a total of $1,300,000 was expended for the construction of the cement plant and the development of the properties before 1913. From a consideration of all of his testimony it is difficult to determine whether he valued the properties at $1,000,000 in 1906 or merely found that they were of such a nature as to warrant an investment of $1,000,000. In 1905, or 1906, he procured an option on the Sky Blue Marble Quarries near Riverside and Los Angeles, Cal., for the Henshaw Brothers. In making his examination of these properties Coe made 23 diamond drill holes and tunneled the deposits to determine the tonnage, which he estimated at 2,000,000 tons. He recommended the construction of a cement plant and the operation of the Sky Blue properties. The option was exercised and the Sky Blue properties acquired for $55,000 and turned over to the Riverside Portland Cement Company. Coe stated that the Riverside

plant for the operation of the Sky Blue properties cost about $1,000,000 and was about the same as the plant which was started in 1906 by the San Juan Portland Cement Company for the operation of the Barbee, Underwood, and Flint deposits. Shortly before the hearing in this proceeding in February, 1931, Coe computed the March 1, 1913, value of the Barbee, Underwood, and Flint deposits, which he estimated at 2,000,000 tons, by the use of figures on the estimated (not actual) cost of 82½ cents for manufacturing a barrel of cement at the Riverside plant in 1906, a selling price of $1.50 per barrel for the cement, an estimated gross profit of 67½ cents per [63] barrel of cement or $2.16 per ton of raw material, or a total estimated gross profit of $4,320,000. The remainder of his computation is as follows:

Present value of deposits based on 10 year life and discount factors of 8% and 4% (Hoskold's Table) before deducting the cost of plant, $4,320,000.x.6124	$2,645,568
Deduct:	
Estimated cost of plant	1,000,000
Total value of deposits	$1,645,568
Value of deposits, per ton	$ .822784

Coe did not value the particular properties with which we are here concerned either in 1906 or 1913, and his testimony shows no familiarity with these properties at or near the basic date. In fact, he

has not examined these properties since 1907. His computation based on the Riverside properties might have more probative value if the comparison had been based upon actual instead of estimated costs of manufacturing cement. Coe stated that there was not much change in the value of limestone deposits in California between 1906 and 1913 and that any value determined in 1906 would hold good in 1913, and yet he stated that the Sky Blue properties, with the same estimate tonnage as the Barbee, Underwood, and Flint properties, cost only $55,000 in 1906. At that time both properties were undeveloped and may be considered comparable.

Herbert Coffman, petitioner's second witness, has had about 30 years experience in the cement industry as a chemist and executive officer. His first contact with the petitioner's properties was in 1916, when he made an analysis of some samples of the limestone in these deposits. Between 1907 and 1914 Coffman was chief chemist for the Riverside Portland [64] Cement Company. He stated that the petitioner's properties could have been as successfully operated as the Riverside properties, that the Riverside company made a profit of $1.815 per ton before deducting depreciation at the rate of 25 cents a ton, or a profit of $1.565 per ton of raw material, and that the limestone in place was worth at least one-half of this amount, or 78 cents per ton. On cross-examination it was shown that Coffman did not know the methods used in computing costs or the actual profit per ton at the Riverside plant, and that he had never checked the figures as to costs in

the cement industry. His opinion of value was based upon assumptions of plant costs, depreciation, cost of manufacturing and selling price of cement, and not actual costs at the Riverside plant.

F. S. Richards, petitioner's third witness, has had many years of experience in the cement industry in the United States and Australia, but had never seen the properties involved in this proceeding until 1923. His testimony was based entirely upon an historical study of conditions in the cement industry in California, and not upon actual experience and observation of conditions at or near the basic date. Richards studied the records of the petitioner's operations after production was begun in 1918, from which he computed a value for the limestone deposits with which we are here concerned. He stated that the valuation so determined as of 1918 would be the same as the valuation as of March 1, 1913, since there were no operations on these properties between 1913 and 1918, and the general state of the cement industry during that period would not [65] affect the valuation. Although he detailed much information about the development and use of cement in California building construction following the San Francisco earthquake, the impetus to the development of that section by the opening of the Panama Canal, transportation costs and differentials in freight charges, etc., he failed to mention the effect, if any, of conditions produced by the World War on the cement industry and particularly upon the value of petitioner's limestone deposits. Even assuming, but not deciding, that his valuation

as of 1918 was correct, that valuation should be discounted by reason of the unusual conditions tending toward inflated values then prevailing. Cf. W. S. Bogle, & Co., Inc., et al. v. Commissioner of Internal Revenue, 26 Fed. (2d) 771, 772.

Richards testified that it is difficult to determine the actual tonnage of a limestone deposit in California due to the lay of the rock, the strata of which may have been disrupted by physical changes in the land, and further that no estimate of the tonnage in a deposit is worth anything until it is backed up by the definite prospect work. Although he did not explain just what he meant by "definite prospect work," neither his testimony nor that of the other witnesses reveals a definite prospecting of the deposits involved in this proceeding at or near the basic date, or at any other time. The first witnesses used an estimated tonnage of 2,000,000 tons while Richards used the respondent's determination of 1,700,000 tons in computing valuation. Shortly before the hearing, Richards prepared a statement showing the total tonnage removed from the Barbee, Underwood, and Flint deposits to be 1,700,000 tons, and the revenue for the years 1918 to 1928, inclusive, before depletion and depreciation in the amount of $3,715,959.42, to which he applied "Discount factor Hoskold's [66] 8 & 4 for 11 years .589748" in determining a discounted value of $2,191,479.62, "Less one-half of plant cost and improvements $675,059.79" or a net valuation of $1,516,419.83 for these deposits. This last sum divided by 1,700,000 tons, Richards stated gave the limestone in place a value

of 89.2 cents per ton. It is to be noted that this valuation is based upon revenue derived from these deposits during the postwar period and not upon expected profits estimated prior to operations (see Reinecke v. Spalding, 280 U. S. 227, in re discounting revenue to arrive at a March 1, 1913, value for depletion purposes). This witness did not know of any sales of limestone properties in the United States on the basis of a computation by Hoskold's formula discounting expected profits from the sale of manufactured cement. Although Richards computes a value of 89.2 cents per ton for the limestone in these deposits as of 1918, which he states would be the same value in 1913, he also tells us that in 1920 and 1921 the petitioner purchased limestone rock in place for 10 cents a ton and acquired a lease in 1927 for quarrying limestone at a royalty of 10 cents a ton. Such sales in 1920 and 1921 are not consistent with a 1918 valuation of 89.2 cents per ton, even after considering possible factors such as quarrying and transportation conditions and the available tonnage, etc.

On brief, the petitioner argues that the testimony of these witnesses overcomes the *prima facie* correctness of the respondent's determination and that this evidence supports a valuation of approximately $1 per ton, citing *Russell, et al.* v. *Commissioner of Internal Revenue,* 45 Fed. (2d) 100, wherein the Circuit Court of Appeals for the First Circuit said: [67]

> While there is a presumption that the Commissioner's findings are correct, *Avery* v. *Com-*

missioner (C. C. A.) 22 F. (2d) 6, 55 A. L. R. 1277, when it appears, as in this record it does appear, that the methods pursued by the Commissioner were mathematically and legally erroneous, that presumption no longer avails. *New York Life Ins. Co.* v. *Ross* (C. C. A.) 30 F. (2d) 80, 82.

There is no contention here that the respondent's determination of the depletion deductions is mathematically erroneous and we do not think that the record shows that determination to be legally erroneous. The only evidence offered by the petitioner to refute the respondent's determination is the opinion testimony of these witnesses, which has been carefully considered. Such evidence is entitled to consideration, but as the Circuit Court of Appeals for the Sixth Circuit said in a recent decision, *Thomas H. Tracy, et al.* v. *Commissioner of Internal Revenue,* ..... Fed. (2d) ....., (November 3, 1931), affirming our decision at 15 B. T. A. 1107;

> * * * while the opinions of experts are competent and often very helpful, such evidence is not considered binding upon the tribunal before which it is produced, at least not to the extent that such tribunal is bound to follow it if contrary to the best judgment of its members. *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99 (C. C. A. 4); *Am-Plus Storage Battery Co.* v. *Commissioner,* 35 F. (2d) 167 (C. C. A. 7). * * *

In *Anchor Co., Inc.* v. *Commissioner of Internal Revenue,* 42 Fed. (2d) 99, is the following:

> * * * Such evidence is competent, but it is not to be blindly followed. It should be weighed by the Board in the light of the other facts developed in the case and of the general knowledge and experience of the members, and is by them to be given only such weight as in the light thereof may seem to be just and reasonable. *The Conqueror,* 166 U. S. 110, 131, * * *; *Head* v. *Hargrave,* 105 U. S. 45, 49 * * *; *Am-Plus Storage Battery Co.* v. *Commissioner* (C. C. A. 7th) 35 F. (2d) 167, 169.

See also *Balaban & Katz Corporation* v. *Commissioner of Internal Revenue,* (C. C. A. 7) 30 Fed. (2d) 807; *Am-Plus Storage Battery Company* v. *Com-* [68] *missioner of Internal Revenue,* 35 Fed. (2d) 167; *H. H. Blumenthal,* 21 B. T. A. 901.

The record is not clear as to whether witness Coe valued the properties in question in 1906 or 1931, or in both of these years. The valuations of the other witnesses were made approximately 18 years after the basic date with which we are here concerned. The March 1, 1913, fair market value of these limestone deposits must be determined in the light of facts then known or then reasonably to be anticipated. *J. J. White Lumber Company,* 24 B. T. A. 274. None of the witnesses has adequately shown a knowledge of the petitioner's limestone deposits on or about the basic date to support his valuation. Each testified to a retrospective valuation which is doubtless "colored by subsequent prosperity" of the cement industry. *W. S. Bogle & Co., Inc., et al.* v.

Commissioner of Internal Revenue, supra. As we said in *E. Louis Jacobs,* 20 B. T. A. 529, 535:

> * * * The longer the period which has elapsed since the date as of which value is expressed, the less reliable is the opinion of value likely to be.

It was within the province of the petitioner to show its actual investment in these properties, which would or would not support the claimed valuation. The allowance for depletion is, after all, a return of capital arising out of a gradual sale of the properties. Lisk Manufacturing Company, Ltd., 15 B. T. A. 1048; United States v. Ludey, 274 U. S. 295. The undisputed facts of record show that these properties, together with a partially completed cement plant and the large acreage [69] designated as the Chittenden Ranch, were acquired in 1912 by the petitioner in exchange for its stock of the par value of $1,700,000, but no value has been established for this stock and no attempt has been made to allocate such value to the several properties so acquired. Such facts would aid our determination. The information submitted in connection with Form F filed with the Commissioner in 1922, in substantiation of petitioner's increase of its claimed depletion deductions from 10 cents to 20 cents per ton, does not support the valuation now claimed by the petitioner. It is to be noted that the estimates and computations submitted in connection with Form F are based upon the tonnage requirements of the mill at its 1922 capacity. There is nothing in this data that shows

with any degree of certainty the relevant facts known or reasonably anticipated at or near the basic date with which we are concerned.

The determination of the fair market value of any property is largely a matter of judgment and various theories of valuation are useful, only so far as they support a result consonant with sound judgment. Portage Silica Company, 11 B. T. A. 700, 705, affirmed 49 Fed. (2d) 485. The theoretical computations of witnesses Coe and Coffman, based upon 1906 estimates of cost and selling price, and the theoretical computation of witness Richards, based upon revenue produced by these deposits, which were discounted by Hoskold's formula, with varying results, do not, in our opinion, establish the fair market value of these properties as of the basic date. As the Circuit Court of Appeals for the Ninth Circuit said in Simons Brick Company v. Commissioner of Internal Revenue, 45 Fed. (2d) 57, 58, certiorari denied 51 S. Ct. 583— [70]

> * * * whatever the value of this [Hoskold's] formula may be in cases where there is no other evidence of the value of deposits of minerals, etc., in place, and where the necessary factors are more clearly proved than in this case, this is not a case for its application. Here there is other evidence of a definite character as to the actual value of the clay lands on March 1, 1913 * * *.

Upon a consideration of all of the evidence, we are of the opinion that the respondent's determina-

tion of the March 1, 1913, value of the petitioner's limestone deposits and his allowances for depletion should not be disturbed.

The next issue is the deductibility of certain amounts designated as "contributions, subscriptions, or donations." This opinion would be inordinately prolonged by a discussion of and decision on each of the enumerated items set forth in our findings of fact. Suffice it to say that such items are deductible or not, when considered in the light of the facts of each case, upon the application of the general principle that "the question always is whether balancing the outlay against the benefits to be reasonably expected, the business interest of the taxpayer will be advanced." See American Rolling Mill Company v. Commissioner of Internal Revenue, 41 Fed. (2d) 314, 315, for a fuller discussion and citation of authorities. See also Yamhill Electric Company, 20 B. T. A. 1232.

Applying this principle to the items in controversy, we hold that items 2, 4, 5, 7, 10, 13, 16, 18, 23, 26, 28, 30, 31, 33, 36, 37, 38, 41, 47, 50, 54, 58, 68, 82, 83, and 84 are deductible; and that items [71] 1, 6, 8, 9, 12, 14, 15, 20, 21, 24, 27, 29, 32, 34, 35, 42, 43, 44, 46, 51, 52, 55, 59, 74, 80 and 83 are not deductible. No evidence was offered regarding items 3, 11, 17, 19, 22, 25, 39, 40, 45, 48, 49, 53, 56, 57, 60 to 67, inclusive, 69 to 73, inclusive, 75 to 79, inclusive, 81, 85, 86, and 87, and the respondent's disallowance of same is approved. In view of the petitioner's method of handling contributions of cement upon its books, no adjustment

of the allowed items representing contributions of cement is necessary, since the credit of the full amount to sales is offset by the allowed deduction. However, the disallowed deductions representing contributions of cement require an adjustment by eliminating the profit upon this cement which has been credited to sales and erroneously included in gross income.

At the hearing, counsel for the respondent conceded error as alleged in the third issue and stipulated that petitioner's gross income had been overstated by the amount of $3,769.57.

The remaining issue is whether the amount of the amortization of bond discount on the bonds of the petitioner's affiliate, the California Central Railroad Company, held by the petitioner during the taxable years under consideration is deductible in computing the consolidated net income of the affiliated corporations for these years. The facts of record do not distinguish the situation here presented from that ruled upon in New Orleans, Texas & Mexico Railway Co., 6 B. T. A. 436, 441, wherein we held that such bond discount was not deductible. Following that decision, the respondent's action in this particular is sustained. See also Gulf, Mobile & Northern Railroad Co., 22 233, 261, wherein we followed our earlier decision on this point.

Reviewed by the Board.

Judgment will be entered under Rule 50.

GOODRICH dissents. [72]

MURDOCK, dissenting: I believe that a correct

result has been reached in the prevailing opinion on the first and last points, but I do not agree that the other issue has been decided properly. The findings of fact indicate that there is insufficient evidence as to many of the items in controversy to determine whether or not they are deductible. Where the petitioner gave away cement of its own manufacture, it did not make sales, and it should not have included the market price of this cement in its gross sales for income-tax purposes. It is a misconception to say that some of these items are "deductible." It is only necessary to eliminate the items from gross sales to settle the present controversy as to these items.

MARQUETTE agrees with this dissent.

A true copy: Teste.

[Seal] B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals. [73]

[Title of Court and Cause.]

ORDER.

Through inadvertence, item "83" appearing on page 10 of the mimeograph report of the Board promulgated in the above-entitled proceeding January 21, 1932, is listed as a deductible item from gross income on the last line of page 24 of the mimeograph report. The item is correctly held not deductible in the second line on page 25 of the mimeograph report. Wherefore, it is——

ORDERED that the figure "83" appearing on

the last line of page 24 be and the same is hereby deleted.

(Signed) CHARLES P. SMITH
Member.

ENTER: March 2, 1932.

CPS:aa.

A true copy: Teste

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals. [74]

United States Board of Tax Appeals
Washington

Docket No. 38853

OLD MISSION PORTLAND CEMENT COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated in the above-entitled proceeding January 21, 1932, counsel for the respondent, on March 30, 1932, filed a notice of settlement and on April 26, 1932, counsel for the petitioner filed a notice to the effect that it "joins with the respondent in praying that the Board enter its decision based upon such computation" and that the computation filed by the respondent on March 30, 1932, "has been examined and found to be in accordance with the

determination of the Board as set forth in its report." The premises considered, it is——

ORDERED and DECIDED as follows:

1923

Tax assessed:		
Original, Account #400033	$45,435.58	
Additional, March 1928-13-C-#3	4,998.64	
Total tax assessed		$50,434.22
Tax paid:		
April 14, 1924	$11,358.90	
June 1, 1924	11,358.90	
September 13, 1924	11,358.90	
December 9, 1924	11,358.88	45,435.58
Unpaid assessment		$ 4,998.64
Correct tax liability	$49,733.60	
Total tax paid	45,435.58	
Unpaid portion of correct tax liability		$ 4,298.02
Total tax assessed		50,434.22
Correct tax liability		49,733.60
Unpaid assessment to be abated		$ 700.62

[75]

1924

Tax assessed:		
Original, Account #402701		$56,940.54
Additional, March 1928-14-C-#3		4,911.59
Total assessed		$61,852.13
Tax paid:		
March 16, 1925	$14,250.00	
June 17, 1925	14,220.27	
September 17, 1925	14,235.14	
December 15, 1925	14,235.13	56,940.54

Unpaid assessment		$ 4,911.59
Correct tax liability	$61,522.63	
Total tax paid	56,940.54	
Unpaid portion of correct tax liability		$ 4,582.09
Total tax assessed		$61,852.13
Correct tax liability		61,522.63
Unpaid assessment to be abated		$ 329.50

1925

Tax assessed:		
Original, Account #402601	$36,913.91	
Additional, March 1928-15-C-#3	6,248.15	$43,162.06
Tax paid:		
March 15, 1926	$ 9,100.00	
June 16, 1926	8,618.68	
September 17, 1926	9,597.62	
December 15, 1926	9,597.61	36,913.91
Unpaid assessment		$ 6,248.15
Correct tax liability		$42,531.03
Tax paid		36,913.91
Unpaid portion of correct tax liability		$ 5,617.12
Total tax assessed		$43,162.06
Correct tax liability		42,531.03
Unpaid assessment to be abated		$ 631.03

[76]

1926

Tax assessed:	
Original, Account #402791	$32,524.97
Additional, March 1928-16-C-#3	8,214.86
Tax assessed	$40,739.83

Tax paid:	March 15, 1927	$ 8,100.00	
	April 7, 1927	31.40	
	June 16, 1927	8,131.40	
	Sept. 16, 1927	8,131.08	
	Dec. 15, 1927	8,131.09	32,524.97
Unpaid assessment			$8,214.86
Correct tax liability			$39,715.95
Total tax paid			32,524.97
Unpaid portion of correct tax liability			$ 7,190.98
Total tax assessed			$40,739.83
Correct tax liability			39,715.95
Unpaid assessment to be abated			$ 1,023.88

Enter: (S.) CHARLES P. SMITH

CPS:aa Member.

[Endorsed]: Entered April 30, 1932. [77]

[Title of Court and Cause.]

PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

To the Honorable the Chief Justice and Associate Justices of the United States Circuit Court of Appeals, Ninth Circuit.

I. JURISDICTION

Your petitioner is aggrieved by a decision of the United States Board of Tax Appeals rendered

April 30th, 1932, in the appeal of Old Mission Portland Cement Company v. Commissioner of Internal Revenue, Docket No. 38853, (25 B.T.A. 305), and respectfully submits its petition for a review thereof by this Honorable Court in accordance with the provisions of Sections 1001, 1002, and 1003, of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928. [78]

II. NATURE OF THE CONTROVERSY

The Old Mission Portland Cement Company, (petitioner), is a corporation organized under the laws of the State of California on February 10, 1912, for the purpose of engaging in the manufacture of Portland cement, with its principal office at San Francisco, California. In that year it transferred part of its stock for certain limestone deposits located about 88 miles south of San Francisco and about half of the machinery necessary for the construction of a million dollar Portland cement plant.

The corporation experienced some difficulty and delay in commencing activities but in 1916 actual construction work on its plant was begun and the mill was completed by 1918 and began the manufacture of cement in that year. Thereafter operations were carried on continuously by it until in 1927 when the aforesaid limestone deposits were exhausted.

The Commissioner of Internal Revenue determined that there were 1,700,000 tons of limestone

in said deposits available and suitable for the making of Portland cement and that the fair market value thereof on March 1st, 1913, was 3.713 cents per ton of limestone in place. In computing petitioner's income for the years 1923 to 1926, inclusive, he has allowed depletion deductions at the rate of 3.713 cents per ton for the limestone removed and consumed in those years. Due to the scarcity on the Pacific coast of limestone deposits suitable for the making of Portland cement, the said limestone deposits in question had a fair market value on March 1st, 1913, far in excess of that allowed or fixed by the Commissioner of Internal Revenue.

Throughout the years involved in this proceeding petitioner owned substantially all of the stock of the San Juan Pacific Railway Company, a California corporation, and this latter company owned substantially all of the stock of the California Central Railroad Company, a California corporation. The Commissioner of Internal Revenue has ruled that the three companies were affiliated for income tax purposes throughout the years involved in this proceeding and there is no controversy over this ruling.

In 1912 the California Central Railroad Company issued its own bonds at a discount. In amortizing this bond discount over the life of the bonds the amount of amortization applicable to each of the four years [79] under consideration is $3,381.18. In computing the consolidated net income for the respective years the Commissioner has allowed

deductions in respect of such bond discount in the amounts of $375.99, for the years 1923, 1924, and 1925, and $220.79 for the year 1926. He disallowed the balance of the amounts of such amortization applicable to the years in question because those balances were applicable to the bonds held in the respective years by petitioner.

In each of the years 1923 to 1926, inclusive, petitioner donated $1,000.00 to the San Francisco Community Chest, this amount being the allotment assigned to it by the Community Chest Committee. In his computation of income for those years respondent has not allowed these deductions.

In 1926 petitioner donated $2500.00 to the San Francisco Y. M. C. A. which was then beginning the erection of a new building. The purchase of the cement materials for said building was to be allotted to the various cement companies in proportion to their donations. As the result of said donation petitioner did furnish a considerable part of the material that went into the building. In determining the net income for 1926 respondent has not allowed this item of $2500.00 as a deduction.

In 1926 petitioner contributed $3,000.00 to a fund to be used in a state-wide campaign for a referendum to increase the gasoline sales tax in California, in order to provide the state with badly needed funds for additional road construction and maintenance over a period of twelve years. The referendum was successful and the State embarked on an extensive road building campaign, using large quan-

tities of cement and cement materials, of which petitioner furnished a share. In computing net income for 1926, respondent has not allowed said contribution as a deduction.

On April 2nd, 1928, the Commissioner notified petitioner by registered mail of his determination of deficiencies in income tax for the years 1923 to 1926, inclusive, in the following amounts:

1923	$ 4,998.64
1924	4,911.59
1925	6,248.15
1926	8,214.86
Total	$24,373.24

From this notice of deficiency petitioner appealed to the Board of Tax Appeals and the Board decided the aforesaid questions in favor of the Commissioner (other questions not [80] involved here being decided in favor of petitioner). The Board's findings of fact and opinion were promulgated on January 21st, 1932, and its final decision was entered April 30th, 1932, wherein after giving effect to the aforesaid holdings complained of, it found and held that the deficiencies due from petioner for the years in question are as follows:

1923	$ 4,298.02
1924	4,582.09
1925	5,617.12
1926	7,190.98

III. ASSIGNMENTS OF ERROR

Petitioner believes and avers that errors were committed by the Board to the damage and preju-

dice of petitioner as follows:

1. The Board erred in admitting in evidence respondent's "Exhibit C", same being the income tax return of petitioner for the year 1912.
2. The Board erred in admitting in evidence respondent's "Exhibit D", same being the income tax return of petitioner for the year 1913.
3. The Board erred in admitting in evidence respondent's "Exhibit E", same being the income tax return of petitioner for the year 1914.
4. The Board erred in admitting in evidence respondent's "Exhibit F", same being the income tax return of petitioner for the year 1915.
5. The Board erred in admitting in evidence respondent's "Exhibit G", same being the income tax return of petitioner for the year 1916.
6. The Board erred in admitting in evidence respondent's "Exhibit H", same being the income tax return of petitioner for the year 1917.
7. The Board erred in admitting in evidence respondent's "Exhibit I", same being petitioner's 1918 income tax return, for the purpose of showing the 1918 income, "the amount claimed for depletion, and the rate of depletion".
8. The Board erred in admitting in evidence respondent's "Exhibit J", same being peti-

tioner's 1919 income tax return, for the purpose of showing the 1919 "income and depletion". [81]

9. The Board erred in admitting in evidence respondent's "Exhibit K", same being petitioner's 1920 income tax return, for the purpose of showing the 1920 "income and depletion".

10. The Board erred in admitting in evidence respondent's "Exhibit L", same being petitioner's 1921 income tax return, for the purpose of showing the 1921 "income and depletion".

11. The Board erred in admitting in evidence respondent's "Exhibit M", same being petitioner's 1922 income tax return, for the purpose of showing the 1922 "income and depletion".

12. The Board erred in admitting in evidence respondent's "Exhibit Q", same being the 1917 capital stock tax return of petitioner, upon the assertion of respondent's counsel that "it will have a bearing * * * in the final decision of this case."

13. The Board erred in admitting in evidence respondent's "Exhibit R", same being the 1918 capital stock tax return of petitioner, upon the assertion of respondent's counsel that "it will have a bearing * * * in the final decision of this case."

14. The Board erred in admitting in evidence respondent's "Exhibit S", same being the 1919

capital stock tax return of petitioner, upon the assertion of respondent's counsel that "it will have a bearing * * * in the final decision of this case."

15. The Board erred in admitting in evidence respondent's "Exhibit T", same being the 1920 capital stock tax return of petitioner, upon the assertion of respondent's counsel that "it will have a bearing * * * in the final decision of this case."

16. The Board erred in admitting in evidence respondent's "Exhibit U", same being the 1922 capital stock tax return of petitioner, upon the assertion of respondent's counsel that "it will have a bearing * * * in the final decision of this case."

17. The Board erred in admitting in evidence respondent's "Exhibit V", same being an abatement claim in respect of the 1917 capital stock tax assessed against petitioner.

18. The Board erred in admitting in evidence as an admission against interest respondent's "Exhibit W", same being a letter dated July 21, 1924. [82]

19. The Board erred in admitting in evidence as an admission against interest respondent's "Exhibit X", same being a letter dated September 4, 1924.

20. The Board erred in admitting in evidence as an admission against interest respondent's "Exhibit Y", same being a letter dated June 6, 1924.

21. The Board erred in failing to accept and follow the uncontradicted testimony of the witnesses as to the March 1, 1913, value of the limestone deposits in question.
22. The Board erred in holding that there was not sufficient evidence to overcome the prima facie correctness of respondent's determination of the March 1, 1913, value of the said limestone deposits.
23. The Board erred in failing to hold that the March 1, 1913, value of the limestone deposits here in question should be determined by the preponderance of the evidence in the case.
24. The Board erred in holding as correct respondent's determination that the March 1, 1913 value of petitioner's said limestone deposits was 3.713 cents per ton of stone in place and that this was the proper rate of depletion in the years in question.
25. The Board erred in failing to find and hold that the March 1, 1913 value of said limestone deposits was not less than 80 cents per ton of limestone in place, or in lieu thereof
26. The Board erred in failing to find from the evidence and hold that the March 1, 1913 value of said limestone deposits was some amount greater than that determined by respondent.
27. The Board erred in basing its decision as to the March 1, 1913, value of said limestone deposits upon parts of the evidence and not upon all of it.

28. The Board erred in finding that "upon its income tax returns for the years 1918, 1919, 1920, and 1921, the petitioner claimed deductions for depletion of mineral deposits at the rate of 10 cents per ton", when such finding is based upon improperly admitted evidence. [83]

29. The Board erred in holding that that portion of the amortization of bond discount of the California Central Railroad Company which was applicable to the bonds held by petitioner during the years in question was not deductible in computing the consolidated net income of petitioner and its affiliated companies during said years.

30. The Board erred in failing to allow as a deduction from income the amount of $1,000.00 paid by petitioner in each of the years 1923 to 1926, inclusive, as its allotment to the San Francisco Community Chest.

31. The Board erred in failing to allow as a deduction from 1926 income the amount of $2500.00 paid by petitioner in that year to the San Francisco Y. M. C. A. for the purpose of procuring part of its orders for cement to be used in the construction of a new building.

32. The Board erred in failing to allow as a deduction from 1926 income the amount of $3,000.00 paid by petitioner in that year to a fund to promote a state-wide referendum for an increased gasoline sales tax levy in order to provide additional funds for road building.

Wherefore, petitioner prays that this Honorable Court will review the said findings, opinion and decision of said Board of Tax Appeals and reverse and set aside the same insofar as the aforesaid assigned errors apply, and therein find for petitioner, and grant such other and further relief as petitioner may be entitled to, or which to the Court may seem equitable and proper.

GEO. E. H. GOODNER,

Attorney for Petitioner, Address: Munsey Building, Washington, D. C.

District of Columbia—ss.

Personally appeared before me, a Notary Public in and for the District of Columbia, Mr. Geo. E. H. Goodner, who being duly sworn according to law deposes and says that he is the attorney for the above named petitioner, and that as such he has authority to sign and did sign the foregoing petition; that he has read the same and that the facts set forth therein are true to the best of his knowledge and belief, and that the said petition is signed in good faith.

GEO. E. H. GOODNER. [84]

Subscribed and sworn to before me this 27th day of October, 1932.

[Seal] FLORENCE M. STEPHENSON,

Notary Public.

My commission expires May 19th, 1936.

[Endorsed]: Filed Oct. 29, 1932. United States Board of Tax Appeals. [85]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The above designated proceeding came on for hearing in Washington, D. C., on February 5, 1931, before the HONORABLE CHARLES P. SMITH, Member, U. S. Board of Tax Appeals. The following is a narrative statement of the proceedings that took place and of the testimony introduced:

There was received in evidence as petitioner's Exhibit 1 a copy of a valuation report made by the Income Tax Unit, dated November 18, 1927 "offered solely for the purpose of showing how the Commissioner arrived at the depletion deductions."

IRA JUDSON COE,

a witness on behalf of Petitioner, testified on

Direct Examination

as follows:

My name is Ira Judson Coe. I reside at Oakland, California. I am a Consulting Engineer and have followed that profession for nearly 30 years.

I graduated from Cornell University in 1894 with the degree of C. E., Civil Engineer. On graduation I was City Engineer of Dover, N. J. and Assistant County Engineer in Morris County, N. J., building about two million dollars of macadam roads under a bond issue over a period of about three years. [86] Following that employment I was Assistant Engineer of East Jersey Water Company under J.

(Testimony of Ira Judson Coe.)

Waldo Smith, who was First Assistant Engineer. This engagement covered the period of about 1898 and 1899. The nature of my work was construction, laying water pipes, and laying a 42-inch water main from Little Falls, N. J. to the City of Paterson. This work was not cement construction.

Leaving the last stated employment I went to the Nazareth Cement Fields in Northampton County, Pa., in 1899. My first duties there were those of Constructing Engineer under Robert F. Wentz in constructing Portland Cement mills. Robert F. Wentz was the Consulting Engineer and I had charge of the construction under Mr. Wentz of what was known as and still is, I suppose, the Dexter Portland Cement Plant at Nazareth. It was a re-vamping of two Portland Cement plants and later on the Nazareth Portland Cement plant. I was Mr. Wentz a little over a year and then about 1901 I opened my own office in Nazareth, Pa. as a Consulting Engineer.

The first work of my own after opening my office was for Wm. M. Beach who was erecting what is known as the Pennsylvania Portland Cement plant at Bath, Pa. Mr. Beach owned the Rosendale plants on the Hudson River and manufactured what was known in those days as Beach's hydraulic cement. This was before much Portland cement was made in the United States. At the same time that Mr. Beach was erecting this plant he was consolidating eight plants along the Hudson River,—

(Testimony of Ira Judson Coe.)

The Rosendale plants manufacturing what we call natural cement.

Besides working for Mr. Beach while running my own office at Nazareth I did a lot of economic work in promotions. [87] One was for a man by the name of Frank H. Banks on a plant near Christian Springs between Nazareth and Bath, Pa. That was the Imperial Portland Cement Company that was never built.

I did work for Wm. B. Schafer who was a promoter on a property west of Bath. Mr. Schafer didn't build a plant. An accident occurred and the man that owned the property died. The property was taken over by someone else but I believe there is a plant there today.

Mr. Schafer then promoted what was then known as the National Portland Cement Company and a plant was built at Martin's Creek on the Delaware River about 20 miles north of the city of Easton, Pa. That plant was financed by Mr. Higginbottom of Chicago, Mr. Bigelow of Milwaukee, and James W. Wiggin. That plant today is Alpha No. 4.

The foregoing are the important projects that I worked on while operating my office at Nazareth. I continued the office until the Spring of 1903 and then moved to California.

I went to California because the cement business looked good there. I had been there on a trip in January, 1901, and had made some preliminary investigations prior to that time. I located at Oakland, just across the bay from San Francisco, and

(Testimony of Ira Judson Coe.)

have continued to reside there until the present.

After locating in Oakland the first property that I took up was what is known as the Nodula limestone deposit about 8 miles west of Antioch in the coal field. That was to develop and see if there was enough material on which to build a cement factory. It was turned down. [88] The next work I did was for Bauman and Kemp Van Ee. I went down in that part of the country and made an investigation of the territory with the idea of erecting a cement plant; that was in 1904. Later on the property became the San Juan Portland Cement plant, commonly referred to as the San Juan property. I first saw this property in 1904 and made a more or less detailed examination of it, but not a complete examination, for the purpose of reporting to some financial men. It was a verbal report entirely at that time and my recommendations were favorable as to the materials, the location, the market, fuel, power, and transportation. I did not go into the various questions involved in the location of a new cement industry or plant in 1904 but did subsequently. In 1904 I made a favorable recommendation upon the plant.

I would guess that I spent about four or five months with Bauman and Kemp Van Ee in 1904 during which time I was in San Juan or in that territory quite a while. It was necessary for me to examine the surrounding territory in order to reach a recommendation and opinion and I did that. I left that engagement and in the Fall of 1905 se-

(Testimony of Ira Judson Coe.)

cured an option on what was then known as the Sky Blue Marble Quarries, 3½ miles West of the City of Riverside, Riverside County, California. I secured that option for Henshaw Brothers who were wealthy men of Oakland and San Francisco. Mr. Wm. G. Henshaw was practically one of the financiers of the first plant that was built in California—the Standard Portland Cement Plant at Napa Junction, which was prior to the time of which I am talking. [89]

The Riverside property was taken over and prospect work was run in the Spring and Summer of 1906. Twenty-three diamond drill holes were sunk on it. I had charge of the work which was contracted out to the Arizona Diamond Drill Company. After this drilling was done the Company was financed and built a mill. The mill was not started until 1909 on account of the panic in 1906 but it has been running ever since.

I was with the Henshaw Brothers for about 14 years commencing in 1905 and the Riverside property and the Henshaw interests occupied my entire time. The Henshaws had other interests besides the Riverside property. In 1906 they became interested in the San Juan property that I was on with Bauman and Kemp VanEe.

The San Juan property is 3½ miles East of the station of Chittenden on the Coast Line of the Southern Pacific Railroad, Chittenden being 88 miles south of San Francisco. I then became con-

(Testimony of Ira Judson Coe.)

nected or identified with the San Juan properties and had charge of the work there for the Henshaw Brothers. In developing the property surveys were made, estimates were made, and economic studies were made. The property in 1906 consisted of the Barbee, the first on your right going up the canyon, then the Underwood, on the left, and then further back the Flint.

Witness then identified the San Juan properties, about which he had been talking, on a map Petitioner's Exhibit 2, as the three properties outlined in red pencil on said map and testified that these three properties as indicated were the Barbee, Underwood and Flint. Witness testified further as follows: [90]

The entire acreage of those properties was not in limestone. There were three segregated deposits of limestone, one on each of the three tracts designated in red. (On Map, Exhibit 2.) Those are the same properties which were later known as the Old Mission Portland Cement properties and the ones involved in this proceeding here of the Old Mission Portland Cement Company.

The map which was identified by witness was then received in evidence as petitioner's Exhibit 2, for the purpose of showing the topography of the country and the general location of the three limestone deposits in question.

Witness testified further as follows:

On the Underwood tract the limestone was exposed on the southern boundary and covered prob-

(Testimony of Ira Judson Coe.)

ably less than 5% of the area. The limestone on the Barbee tract was a case of float, a residual deposit. The greater amount of the limestone had been eroded away; disappeared; was not there. The Flint tract had a better showing. The surface showing on the Flint property covered about 10% area.

The general nature of the country there was rugged. The lines on the map (Exhibit 2) show Government contours. The black line with cross marks on it represents a railroad which was built subsequent to the time I inspected the property in 1906. The school house designated on the map (Exhibit 2) was there at the date of publication of the survey, this map being a photostat of a Government survey. This particular San Juan location is a little more than half way from San Jose to Salinas. [91]

Witness then identified a map (Petitioner's Exhibit 3) and testified further as follows:

This is a map showing the distribution of cement plants in the United States and the principle limestone formations east of the Rocky Mountains and in California, prepared by Frank S. Fouchard. The map was prepared by the U. S. Geological Survey, Mr. George Otis Smith, Director, and is the recognized map used by the men in my profession to show the limestone deposits of the country. The map was published in 1911 as Plate 15, of "Mineral Resources 1910, Part 2."

Said map was thereupon received in evidence as petitioner's Exhibit 3, for the purpose of showing

(Testimony of Ira Judson Coe.)

the location thereon of the San Juan property. Witness thereupon with a red pencil indicated by a small circle the San Juan properties about which he had been testifying and testified as follows:

When I became connected with these properties for the Henshaw Brothers in 1906 I acted in an advisory position. The Henshaws were figuring on joining with other interests in financing the proposition. They called upon me to make a recommendation as to whether or not it was a good venture and I made such a recommendation. In arriving at this recommendation I went through the ordinary processes of an engineer and economic expert. I examined other limestone properties in California and in 1906 was fairly well familiar with other limestone deposits. I had covered you see two years. At that time there were three cement mills operating in California, one in Southern California and two near San Francisco Bay. [92] I took into consideration the character of the San Juan deposits and the quality of the stone. The venture was contemplated for the purpose of manufacturing Portland Cement and I found that the deposit would make a first class article. Other ingredients besides limestone necessary to make Portland cement are argilaceous or clay material and this was on the property also in sufficient quantities.

Other factors taken into consideration aside from the quality of the stone were first, there must be a market. I went into that question and found a

(Testimony of Ira Judson Coe.)

market existing for this deposit in San Francisco. At that time the fire and earthquake had laid waste the City of San Francisco and everybody was trying to get cement plants going. The re-building of San Francisco had started and it is not all built yet. The re-building of the burned part of the City is about completed. There has been no cessation in building activities in San Francisco since the earthquake. Construction since that time in San Francisco is concrete because the earthquake proved that concrete structures remained standing while masonry, brick, and loose steel had collapsed. Buildings or structures of concrete are so designed today that they will stay. I took that into consideration in sizing up the property.

The Panama Canal was then either building or under construction and we figured that the Pacific coast would derive enormous benefits from it and this has proven true. I also took into consideration the fast growing population of the Pacific coast. The population of San Francisco has steadily increased since that time but not heavily. There [93] is no room for San Francisco to grow except down in another man's territory or up in the air. The adjacent cities surrounding it have grown since that time. We call San Francisco and the other adjacent cities the Bay District. There has been a steady increase in growth in the Bay District since that time and no recession. I believe it could be proven even during the panic.

(Testimony of Ira Judson Coe.)

When you pass on cement properties you have to pass on the whole thing and I did that. I figured that that (San Juan property) would be a profitable venture and I must have placed a value on it or made a recommendation in regard to the value of it because they put over $300,000 of their money into it. I placed a value on it of a million dollars in 1906 for the stone in place. That was based upon my investigation and experience in the cement industry.

In making my recommendation I took into consideration the great quantities of limestone in the central and eastern portions of the United States. Limestone properties in the eastern part of the country as limestone material are not valued as values go because of the great extent of them. Extensive deposits are not found on the Pacific coast anywhere near the centers of population. We have one nice deposit at Kennett, which is known all over the United States. It would probably cover 1000 acres. In the Nazareth belt I could probably built a cement factory from Slatington across the county along the railroad every mile between Bath and Stockerton where I was in 1903. I think there are [94] eight mills there in a distance of eight miles.

In California we have a mill in San Francisco and the next mill is on the coast line 560 miles away. That was in 1906 and true today. In arriving at my recommendation I took into consideration the scarcity of material on the Pacific coast. After

(Testimony of Ira Judson Coe.)

this same time in 1906 I had an option for the sum of $3,000,000.00 on the limestones owned by the Cowell Lime and Cement Company. They owned a small ledge up near Auburn. They owned what we called a travertine deposit near Mt. Diablo and they owned another deposit near Santa Cruz. They also owned a piece of limestone land on the Pacific coast at a place called Rockport, but it was unsuccessful and worthless. In that same option ($3,000,000.00) there was included a 31% interest in the Roach Harbor Limestone deposit right near Seattle. That was in 1906. That is what limestone was worth in California in 1906.

In 1906 I was in the employ of Wm. G. Henshaw and his brother. Mr. Henshaw was a wealthy man with the idea of—his plan of action was the development of the Pacific coast. He was a constructor. I was associated with them for about 14 years.

When I went on to the San Juan property in 1906 I made a surface examination of the deposits, geological study of the structure, and a study of the factory sites, transportation, power, supply of water and supply of oil. We all knew the market. I made a favorable recommendation on Mr. Henshaw's going into the proposition. I probably did not place a valuation upon the property at that time. (I considered) the value or I would not have recommended the investment. After my examination they started financing and financed the project. [95] They started to build a mill and the

(Testimony of Ira Judson Coe.)

panic came on and dissention among the men interested in the project held it up.

The condition of the property on March 1, 1913 was just the same as it was in 1906—that is, the limestone deposits were the same. By 1913 foundations had been laid, the machinery had been purchased, machinery had been delivered, and some of the machinery had been set. An expenditure of about one million three hundred thousand dollars was made on it by that time. With respect to a plant location or site, the three limestone deposits were practically adjacent. Having a plant site adjacent to the limestone deposit is a saving in freight charges. On that proposition the property was as good as any property in operation in California at that time.

In 1913 the Standard Portland Cement Company plant was running at Napa Junction, in northern California. The Pacific Portland plant was running at what I call Tolenas, but the town was called Cement. That was about 3½ miles from the main line of the Overland Route of the Southern Pacific Railway.

In 1913 I would say that the Standard had run out of its material and was shipping stuff in from their other property at Santa Cruz and borrowing some stone, as you would call it, from the Pacific Portland. At that time the market was much larger than the production and it was [96] beneficial to keep all the plants running and keep the Company going.

(Testimony of Ira Judson Coe.)

The market for the San Juan properties was in San Francisco and adjacent cities and its location compared equal with other cement properties whose market was also in San Francisco and adjacent territory. The Mt. Diablo Cement Company, at Cowell, had a shorter haul and had, as you would call it, a forced rate. They had a cheaper rate on their cement into San Francisco. The freight rates in California are not set by the railroad companies. Neither are power contracts. We have a commission and it tells the railroad what they can charge and it tells the power companies (when) to raise their rates. The San Juan properties had equal railroad and freight facilities with the other operating concerns at that time.

I was actively engaged in the cement business up to March 1, 1913 and that has been my business up to the present time. In arriving at values of limestone deposits in California I used the experience I had in the East, particularly in Pennsylvania. In the East we had limestone everywhere in the Nazareth belt—that is, in Northampton County, Pa., where I was located. It was very plentiful. In California it was very scarce. Limestone from the eastern states was not shipped to California and utilized because of the cost of transportation and that applies to manufacturing cement as well. The freight rates on cement from the East were prohibitive in getting it into [97] San Francisco. During our boom days as you might call them when consumption was far greater

(Testimony of Ira Judson Coe.)

than production we shipped trainloads of Portland Cement from Independence, Kansas, which used to be shipped in refrigerator cars on their return to load oranges. That was before 1913 and was in 1909, 1910, and 1911, and probably 1908. That was possible because California was not producing enough cement to supply the demand.

I have arrived at a valuation as of March 1, 1913, of the three limestone deposits here in question and have done that in the light of my knowledge and experience up to that time. I have reduced my valuation to figures on paper which I have here (Exhibit No. 7). This is my signature on the bottom of it.

The first step that I ordinarily take in arriving at the value of a property is to look at the profits to be made from it and I did that in this case here. The elements in determining that profit are manufacturing costs and I determined the manufacturing costs in this case to be 60¢ a barrel; that is, the mill cost. You arrive at this by taking various shipments. You take labor, power, fuel, repairs, supplies, and renewals. I knew in 1913 what those were. They were practically standard prices recognized in the industry and the prevailing standard prices at that time. I put those on the paper (Exhibit 7). In that way I arrived at a total mill cost of 60¢ per barrel which includes [98] the mining of the stone, grinding the stone, drying, calsining, re-drying, adding gypsum and putting into stock bin. No cost of plant is included in that amount.

(Testimony of Ira Judson Coe.)

The next item is packing cost—that is, the cost of sacking the cement. At that time we used to keep these items separate. That was the recognized standard of packing and that gave a total of 65¢ practically on board cars.

We figured the selling cost, the next item, at 10¢ a barrel which was an average cost at that time. You could run it up or you could save much on it. That was an economical figure that we placed on it. The next item is 7½¢ for running the general office, the payments to the officers, president and general manager. It is the head office expense; that gives a total manufacturing cost of 82½¢ which was a fair cost of manufacturing at that time.

The Santa Cruz plant was the largest plant in California. The difference in the price (size) of the plants would make a little difference in the manufacturing cost in your mill overhead cost. There would be no difference in the labor. Your other costs, your overhead at the mill, your same foremen, your same superintendent, your same chemical control outfit, would take care of a 4,000 barrel plant. I am figuring here on a 2,000 barrel plant, which is supposed to be a minimum size for economical operation. 2,000 barrels a day.

After arriving at total manufacturing cost the next step is the difference between the cost and the selling price, the price you get for it. [99]

The selling price of cement around San Francisco Bay for eleven years was practically $1.50 a barrel f. o. b. mill. $1.50 barrel was the net realiza-

(Testimony of Ira Judson Coe.)

tion after payment of the freight. That was a standard recognized selling price for some time prior to 1913 and was controlled by the cost of importing cement. That condition existed in 1913 and there was a prospect that it would continue as good as $1.50 in the future. I feel that in valuing a property as of that date you are justified in using the prior average selling cost as your basis.

Taking the total cost of 88½¢ from the $1.50 gives 67½¢ a barrel which represents the gross profit. That is a fair basis of computing the profit at that time. 60¢ was the price that engineers recognized as the necessary profit. The promoters all used $1.00 a barrel but engineers used 60¢.

A ton of cement material will make 3.2 barrels. Then multiplying the profit per barrel by 3.2 I arrive at the profit per ton on the raw material which I show on the paper (Exhibit 7) to be $2.16. That represents my experience of the value per ton at that time of raw material of the quality of the San Juan deposit.

I estimated that on March 1, 1913 there were practically 2,000,000 tons of limestone the same as there was in 1906. That was my judgment at that time and applying the value per ton to the 2,000,000 tons gives a gross figure here of $4,320,000.00. That figure represents the fair market [100] value of that property. I reduced that figure by multiplying by a discount factor because that is the custom now among engineers in working out problems. It is necessary to discount the total gross profits

(Testimony of Ira Judson Coe.)

in arriving at the value on March 1, 1913, in order to take your profit per year and your write-off, so that your capital will be returned to you at the end of the period when the material is exhausted. This is the recognized discount factor which I have used that is commonly used by engineers in calculations of this kind. Applying this discount factor I got a value of $2,645,568.00. The plant would be practically valueless with the material exhausted. A plant to take care of those deposits would have cost practically $1,000,000.00 from my own experience. I have estimated and erected the Riverside Cement plant of the same size—a 2,000 barrel plant. In my valuation here I used the same sized plant as Riverside and a plant of that size was adequate to economically handle the limestone in the San Juan properties. After deducting the cost of plant there is a remaining total value of $1,645,568.00 which is the value of the deposits. Dividing this value of the deposits by the 2,000,000 tons gives .822784—82¢ a ton. That in my opinion represents the fair market value as of March 1, 1913.

That valuation is based upon my knowledge and information at that time. It has been possible for me to exclude my subsequent experiences in the cement industry in arriving at that figure and it was possible for me to refresh my mind and I did refresh my mind as to the cost [101] and selling prices of the materials at that time.

If I were valuing that same property on March 1,

(Testimony of Ira Judson Coe.)

1913, today, in the light of my subsequent experience and knowledge, it would probably be worth more today than it was in 1913. My knowledge of the development of the industry today applied to 1913 would give a greater figure than that. I am still of the opinion that that figure represents the fair market value of the properties as of that date and nothing has happened since to change my mind.

I have testified to the fair market value of the property and prepared myself to do so by refreshing my mind. By "fair market value" I mean the price that one man would pay to another each knowing what he was buying. It would be necessary for each one to know the property in order to arrive at a fair market value. I bought some properties and the other fellow did not know what they were worth and I got them at somewhat less than the fair market value. A forced sale or bankrupt sale would not necessarily be fair market value.

There was thereupon received in evidence as Petioner's Exhibit 7 the statement of valuation prepared by witness and theretofore testified to by him. Witness testified further:

The fact that Henshaw Brothers encountered financial difficulties in the first attempt to develop this [102] property has had nothing to do with my opinion as to its value. I was with Henshaw Brothers for about 14 years, or up to about 1918. I don't know the dates. I have had nothing to do with the San Juan properties since that time and am not interested in any way in the San Juan properties

(Testimony of Ira Judson Coe.)

today. I have no interest in this tax case. My business is that of Consulting Engineer in the cement industry whenever there is work. There is not so much work in the cement business today. It is pretty well developed. I have covered the coast and there is not anything more to be found. All of the merchantable limestone deposits available out there have not been developed, but are all held and known.

It would have been possible to operate the San Juan properties prior to 1913 if the money had been available to make the necessary construction and at the profit that I have indicated in this statement (Exhibit 7).

I do not know the date when the San Juan property did commence to operate. I had no connection with it when it started to operate and the only way I can connect it was when Mr. Parker and Mr. Coffman left our property and went up there. I don't know whether it was in 1915 or 1916. Assuming that the development in operation of the property was delayed until 1918, I think the profit realized from the property at that time would have been [103] more than the profits to be realized in 1913. It would have been as much. I have not the figures but I could get them in a few minutes. The Government publishes those every year. Surely the profits would reasonably have been as much for they made the money.

Witness testified on Cross Examination as follows:

I moved to California in 1903. This was not my first visit. I was first in California in the winter

(Testimony of Ira Judson Coe.)

of 1900-1901. That was my first trip to California at Christmas time and New Years 1901. On going there in 1903 I resided in Oakland.

The first work I did in California was to examine a deposit of nodular limestone back of Antioch under Mt. Diablo. That is closer to San Francisco than Los Angeles. About 35 miles from San Francisco. In examining this property I stripped the surface in some places and ran some tunnels into the deposits. I was then employed by Tyler Henshaw, C. B. Gould, and A. S. MacDonald. I made a verbal report on the property.

The next work of record that I did in California was at Chittenden ranch. It is a part, I suppose, today, of the San Juan or Old Mission Cement Company. It was part of their property at that time but is now known as the San Juan property and went in with the San Juan Cement Company, a part and parcel of the San Juan property. [104]

The Chittenden ranch consisted of about 1010 acres. We simply got clay material on that property. I did not examine it for oil but Mr. Stratton was drilling the property at that time for oil; as near as I can remember that was in 1904. I made only a verbal report in 1904 about this property known as the San Juan, including the Chittenden ranch.

In 1905 I made an examination of the Sky Blue property located 3½ to 5 miles north of Riverside, in Riverside County. That property was known as the Sky Blue Marble Quarries and was owned by a

(Testimony of Ira Judson Coe.)

Nebraska corporation. It consisted of 35 acres and was not a large property. That is the area that the Nebraska corporation owned. About 10 acres of it was covered with limestone, the quantity of which was of course unknown at the time. I estimated about 2,000,000 tons. That was in 1905, at Christmas time. There was no railroad at Riverside and it was 4 miles in an air line from Riverside. I don't know whether it was in some places nearer 3 miles to the railroad but a little less than 4 miles. I think the Santa Fe railroad was a little nearer at Bloomington. About 2½ miles away. On the Southern Pacific the nearest place to the railroad was at High Grove, which is a little way out beyond Riverside toward Colton. From memory I would say that it was about 3½ miles. I made surveys and I was the first man to run the railroad to High Grove and Bloomington. [105]

This Sky Blue Marble Quarries property which I examined in 1905 was about 2½ or 2 miles from one railroad; 3 or 3½ miles from another railroad, and approximately 4 or 4½ miles from Riverside, California. Riverside was not a junction point for the railroads. Three railroads ran through Riverside, the Salt Lake Railroad, Southern Pacific, and the Santa Fe. I determined that there were approximately 2,000,000 tons of rock on this property by simple study of the geological structure. I did not drill in 1905. I had two weeks' option on it and made a careful study during that two weeks. I made an estimate of the available tonnage and

(Testimony of Ira Judson Coe.)

finally arrived at what I thought was conservatively 2,000,000 tons. I obtained the option from a man by the name of Baxter. He was a broker located in Los Angeles, California. He gave me the option and I had two weeks to make my examination and exercise it. I have no copy of the option with me but the terms were $25,000.00 down and the balance of $30,000.00 in a very short time.

I paid $55,000.00 for the 10-acres of limestone. The $55,000.00 covered the 35 acres. The market for limestone from this quarry would be in or around Los Angeles. I made a careful examination of the property by 23 diamond drill holes, I think it was 23. After we bought any property, we wanted to develop, the first work was to open cuts. There was no work on this property, except a little lime kiln plant on what we called the Sky Blue Hill. [106] To give you a picture of all the property, it was two little buttes sticking out of the plain. One we called Sky Blue; the other we called Chino. The Sky Blue was a very pretty marble, that they tried to work as marble, and also to use the refuse in burning lime. From the Chino hill it was a white limestone, a different structure, a different grain. That limestone was quarried and shipped to Senator Clark's Brother's Sugar Factory, at Los Alamedos. That was what we called the sugar lime.

The plant was completed on the Riverside property in the Fall of 1909, as I remember it. The Sky Blue Marble Quarry was turned into the Riv-

(Testimony of Ira Judson Coe.)

erside property together with 42 acres, other pieces of land that we bought there. It was turned over to the Riverside Portland Cement Company probably in 1906. The Sky Blue Marble Quarry had no known clay on it when we bought it. There was no clay on it. The only clay I found on the property was a little sediment out around the lime kilns. It was not clay. The material I found on that property to use for clay as a clay mixture is a green blend—tile. That was our clay material. I did not turn the Sky Blue property into the Riverside Portland Cement Company. I was the engineer and took the option on behalf of Wm. G. Henshaw. He was the organizer of the Riverside Portland Cement Company which was started in 1905. They did not complete their plan, though, until 1909. The delay was due to the fire and earthquake in San Francisco. [107]

The fire and earthquake were in San Francisco and the property was located down the other side of Los Angeles but there was a panic in New York and it affected San Francisco just the same and the earthquake in San Francisco ruined their millionaires. Those millionaires were back of that Riverside Portland Cement Company, namely John Martin, Eugene Dessabla and others. On account of the panic in 1907 and the earthquake disaster in San Francisco they ran into financial difficulties and could not complete the plant. They recovered from the depression but where they obtained the capital to complete the plant, that is a personal matter I suppose. I don't know. I know a lot about it; yes. I think Mr. Henshaw put a loan on

(Testimony of Ira Judson Coe.)

what was known as the McDonald Building, located in Oakland, California. I think the loan was about $550,000.00 but they had 50 or 60,000 acres in Mendocina County. He mortgaged other property so that he could obtain sufficient capital to take care of the proposition.

The plant constructed on that property in 1909 was supposed to be a 2000 barrel plant, costing approximately $1,000,000.00. In arriving at that cost of $1,000,000.00 I have in mind the buying of the machinery. The $1,000,000 does not consist entirely of machinery but includes foundations to set the machinery on. The cost also included the buildings which were structural steel used to cover the machinery. Other buildings were office buildings, laboratory buildings, machine shops, carpenter shops, and anything that goes into a factory. That $1,000,000.00 figure that I stated was [108] just a round figure. I have direct information as to that. At the same time I bought the Riverside machinery I bought the San Juan. Our machinery was placed in this place. I do not know anything about the Wyman Lime Quarry, not by that name. It must have been some other name, if you can give it to me. The Riverside Company bought some properties up near Cajan from Colonel Merrill, one of the managers of the Fuel Department, lubricating department, of the Standard Oil Company. That might have been in 1911 and consisted of little bits of ledges. In the Cajan Pass there is not any deposit. There are probably 30 of them exposed that

(Testimony of Ira Judson Coe.)

will carry a million tons. There would not be any one of them that would carry a million tons. I could name them all if I could look them up on a map. I could tell you twenty of them, where exposures are.

Wyman has been in the lime business down there for fifty years. Idon't know whether he had anything to do with what they took over later on, a big plant out there at Ora Grande. I don't know it as the Wyman. I don't know of anything about that. Wyman had some stuff up at Tehachipi. I have just stated that there were approximately 20 acres up in this Tehachipi section with an estimate of one million tons. Some little plant started up there that I don't suppose had more than one hundred thousand. I have never seen one that had 1,000,000 tons. I am giving you the benefit of the doubt. The Riverside Portland Cement Company might have purchased one of those of approximately 800,000 tons, [109] for $8,000.00 in 1911. I don't know where it is located. Cajan is the pass located about 20 miles northeast of the town of San Bernardino. It is the pass through which the Santa Fe and Union Pacific go. It is not close to the railroad. It is mountainous country set back. I don't know what property it was. I don't know what property you mean. I have seen every limestone deposit on the Pacific coast, that is commercial from British Columbia down into Mexico. That has been my business for 25 years. I might have a different name for that property.

(Testimony of Ira Judson Coe.)

I do not know what time of the year in 1906 I was employed by Henshaw Brothers to make an examination of the San Juan property; that is, whether spring or fall. I might say that I was not employed. I was with them always. I was one of them, not like in a big corporation. I was practically a free lance. In a broad sense I was prospecting. Mr. Henshaw built the Napa (plant)—that the Standard Portland Cement Company has in Northern California. It was in 1902 and 1903 that he built the plant up North; that is, he financed it. It was a 2,000,000 barrel plant and was an absolute reproduction of a plant that I built at Stockerton in Pennsylvania. That was the plant of the Standard Portland Cement Company located at Napa Junction. In an air-line probably 50 miles from San Francisco. They went up to Vallejo and went across on the ferry there and went on up through there. I think that plent was completed [110] in 1902. Dr. Bauchman, from Nazareth, came out there before I did. We were both working together at Nazareth. They came to Nazareth to get us.

In 1906 the Santa Cruz Cement plant near San Francisco was being developed. It was going to be a large plant as I remember it. I think they had 16 kilns. That did not mean much because they were small kilns. They would probably be 60,000 barrels a day. 60,000 barrels production per day was what they were figuring on. This is from memory and that was the year 1906. The Santa Cruz

(Testimony of Ira Judson Coe.)

plant was located at Davenport. Whether that has been named since they went in there or not I don't know. Davenport was 20 miles north on the coast from the town of Santa Cruz. Probably 70 miles from San Francisco by transportation and that would be the closest point. There are two railroads going to Santa Cruz—the Southern Pacific two lines from San Francisco. One is about 120 miles and the other is 80, so that the short line to the Santa Cruz plant would be 100 miles from San Francisco. The long way it would be 120 miles. They would give them a freight rate of $1.00 and $1.20 because that was more hilly going over the mountains.

From 1906 to 1913 the Pacific Portland plant was near to or close to San Francisco. It was located at a town called Cement, California, which was opposite the station of Tolenas about 75 miles from San Francisco— [111] between 70 and 80 miles. I do not know what the capacity of the Pacific Portland plant at that place was. It may have been a large plant in those days—not 4,000 barrels per day. I think the smallest plant constructed out there between 1906 and 1913 was 2,000 barrels. I do not remember what the Pacific Portland's first plant was and I do not know when they built their second plant. They were Mill A and Mill B. I think Mill B was built before 1913.

Another plant near San Francisco was Cowell. That was owned by the Henry Cowell Lime and Cement Company. I do not know the distance from San Francisco, but approximately 30 or 40

(Testimony of Ira Judson Coe.)

miles. That was a 2,000,000 barrel plant and it started in 1907 I think. It continued to operate up to 1913 and is still operating today.

Those are all of the other plants that I have in mind near San Francisco up to 1913.

I have said that I was employed by Mr. Henshaw on the San Juan property. It is located I think at Chittenden, 88 miles from San Francisco. Chittenden was taken as the junction point and the railroad was built out to San Juan from there because these people owned the Chittenden ranch. The railroad should not have been connected there. It should have been connected at what is called Beet Siding, used to ship sugar beets to a station called Sargeant, [112] probably 4 or 5 miles nearer San Francisco.

Petitioner's Exhibit 2 is a map which shows the San Juan property. I do not know the approximate number of acres in the property. The Flint tract was about 1,000 acres. No, I don't know that it contained only 512 acres and I have no way of refreshing my memory to find out now. It may be that the Flint was 512 acres. I forget the purchase. I knew that the Chittenden ranch was a large ranch but I had nothing to do with the buying of any of that land. I made an investigation of the property and proposed that they should locate a plant there. There was an abundance of room for a plant. They did not need 160 acres—about 20 acres.

There were three deposits on this land and that

(Testimony of Ira Judson Coe.)

does not include the Chittenden ranch. North is at the top of the map, Petitioner's Exhibit 2, where it is marked "Petitioner's Exhibit No. 2."

I do not know the acreage of the Underwood lime deposit. I do not remember how many tons I allocated to the Underwood Lime Deposit when I made my estimate of 2,000,000 tons. My memory is hooked up with two properties at Riverside and the San Juan. I figured that the exposure at Riverside and at San Juan were practically the same. I was not looking at the sky. I looked in the ground. At Riverside I had two buttes covered with sagebrush, jack rabbits and rattle snakes. At San Juan I had limestone [113] ledges exposed. My knowledge of the limestone in the north there where I had spent two or three years doing nothing else but examining these exposed limestone deposits—I was not so sure of the flint being a solid deposit. None of the property which I am speaking of was level.

I remember all that because there is an exposure here in a canyon. I don't know whether it is called Marble Creek or Marble Falls. In my examination they had brushed out this limestone exposure, cutting through brush this way and that way, up to the top of the hill and down over into the other side, passing into the other canyon. This limestone lead was exposed probably 1,000 feet. There was a beautiful exposure down there in Marble Canyon. I am now speaking of the Flint piece. Then we had a great argument in Mr. Henshaw's office, and

(Testimony of Ira Judson Coe.)

had all the experts there; Professor Brainard, who was president of the Stanford University, probably one of the greatest geologists this country has ever known, a representative of H. S. Spachman Company in Philadelphia, and others, and their contention was that this ledge—you had it exposed here in Marble Falls, you had it exposed over in this canyon; it was 1,000 feet wide, it was one-half mile long, and all you had to do was to just figure what—I said "It may be only a shell." I said "You say it is a solid piece from there to there." I said "Why can't it be just like that, and a shell over the top of it?" [114]

That is the way it turned out to be. It turned out to be a shell. I was not the engineer in charge.

I drilled through the property known as the Sky Blue property. I had full charge of it. I was the first engineer in California to stick a diamond drill in the ground, I think. That was back in 1906 and I did that when the Riverside acquired the property known as the Sky Blue.

I had nothing to do then with the drilling for San Juan—simply in an advisory position representing the Henshaw investments. I just told you I examined the San Juan property. I did not have anything to do with the development of it. I was in an advisory capacity there. I was a Check Engineer. I was checking the other engineers. I did not follow them up. I made my own determinations and then we had the conference. I did not make a written report. The only written reports I ever

(Testimony of Ira Judson Coe.)

made for the Henshaw outfit were reports where I wished to put myself on record. I do not mean I did not want to put myself on record on this property—I mean, when I wanted them to go into the file. My reports were all made to Mr. Henshaw verbally. I may have written a report and put it into file and might have taken it up with him. My relation with that outfit was not like an employee of a corporation, an employed engineer. It was not organized. The Riverside today has a manager and an assistant manager [115] and everything else. In those days there were just the three of us. It would have been a good thing if there had been friendship in the Old Mission Portland Cement Company. They called the outfit in the San Juan "The Lime Kiln Crowd" until there was a fall-out.

I do not know how many acres the Underwood lime deposit covered. Neither do I know how many acres the Barbee and Flint deposit covered. I know the Chittenden ranch was a large ranch. I never knew the acreage. Eventually when we took over the Flint piece my idea, as I stated to you a little while ago, was that I went over 1000 acres when I made the examination of what is known as the Flint. I went over that property and if my memory serves me there was 1000 acres in the tract—in the Flint tract. I have no way to check my memory on that now. I was not interested in the acreage. I think it was 1000 acres because I knew Senator Flint and he said he was selling them 1000 acres.

(Testimony of Ira Judson Coe.)

Maybe he sold them the factory site. It may have consisted of other property.

The map, Petitioner's Exhibit 2, shows a railroad but I do not know what railroad it is. It was built since I was there in 1907. I have been a guest there since 1907—visited there, but have never examined it since 1907. I noticed a railroad when I was a guest there. I have been there several times but I do not know when that [116] railroad was put there. It was not there in 1907. I think it was put in by the San Juan crowd. The Southern Pacific owned a quarry road 10 or 12 miles from this town. It is not marked "Quarry Railroad" on the map and not marked anything but it is a quarry railroad. The other railroad goes over and connects with the Coast Division of the Southern Pacific Railway. The railroad running from the Southern Pacific at Chittenden to the plant at San Juan was a privately owned railroad. I can only guess the distance from where the plant was finally located to the Southern Pacific Railroad. I made the survey for that railroad in the early days. That railroad was to run from the Pacific Ocean on Monterey Bay about five miles south of the town of Watsonville. That railroad was to start there and come to Watsonville up through the Chittenden Pass. I made that survey in the Spring of 1905, maybe, or late in 1904. I do not remember the date. That survey was run over to San Juan, then to Hollister, the county seat, and on up through Pachaco Pass and was to go over and connect at

(Testimony of Ira Judson Coe.)

Fresno. It was a promotion and the railroad was Watsonville down to the harbor and steamers all ran from that harbor at the end of that railroad and carried strawberries, fruits, etc. from the Watsonville valley to San Francisco.

I would guess that it was between 5½ and 6 miles from the San Juan property to the Southern Pacific [117] railroad. It might have been 8½ miles to the plant. My memory might be simply to the town. The town is 2½ to 2 miles. If I had any reference or could get a railroad timetable or something or other I could tell you what it was, but not from memory. I said it was between 5 and 6 miles and I think that is correct, but I do not know whether it was 8 or 8½ miles or not.

The Southern Pacific was running along there in 1906. The road was built way back in the early days. That was one of the first railroads built in California, but in 1906 there was no railroad that connected the Southern Pacific and the San Juan property.

I do not know when that new railroad was built between the Southern Pacific and the San Juan property. I don't know what date it was built but the survey showed it was just a little flat plain. Across the valley there was no construction done except to lay the road bed and lay ties and put rails on. It could have been built in a few days. It was very cheap construction. The right of way was nothing, so different from Riverside. When

(Testimony of Ira Judson Coe.)

you get to Riverside you have land to go through that is worth $2,000.00 an acre and Riverside really could not afford to buy that right of way. You would have to go into the court and have a condemnation proceeding. The Riverside City Chamber of Commerce got [118] together and said "If you will come to Riverside we will buy the right of way and give it to you." It did not cost Riverside anything to get in there. The same way with the San Juan crowd. They said "If you will come in here we will build your railroad for you."

Part of the line in between San Juan and the Southern Pacific was owned by Miller and Lux. They were the largest land owners maybe in the United States. They were great cattle kings. They owned land in Oregon, California, and Washington and over into Arizona and Nevada. They were known as a cattle company. They could move their cattle from one State or from one end of the State to the other and camp their cattle on their land every night.

The San Juan plant was nearest to the Barbee piece. The Underwood followed the Barbee a little further up the canyon. The height of the Barbee deposit was 1080 feet at the highest point. The highest part of the Underwood is 1155 feet and the peak of the Flint was 1600 feet. The distance between the Barbee deposit and the Underwood deposit was a good mile according to the map (Petitioner's Exhibit 2). In order to get from the Barbee to the Underwood deposit you went up the

(Testimony of Ira Judson Coe.)

canyon,—a mile up the canyon. The distance from the Barbee to the Flint deposit was one-half mile, a distance of approximately 2½ miles from where the plant was located. The [119] distance from the plant site to the Underwood was about 1½ miles and the Barbee adjoined the plant. The Underwood was about 1 mile from the plant and the Flint was about 2½ miles from the plant. I took this mileage off the map on section lines. It would be longer probably to go around through the canyon.

At the time we examined the property we figured the cheapeast way to bring the product down was by a tramway or a surface railway. It was necessary to construct a railway to the Underwood and Flint deposits. It would have been a little further around to use a surface tramway than to go straight across.

I made an examination of the Barbee deposit but eliminated it entirely because it appeared to be a residual deposit—a left-over lot of material that was not serviceable except as you would pick it up and take it, but it was not a quarrying proposition. The land in there is worth about $2.50 an acre. The land in the Barbee deposit was scattered. I don't know the area that it covered but the limestone on that property was enormous in this way that there were little rocks fallen down that had been lead and they were piled up all along just as though it was brought in there and deposited.

I don't know the acreage of the Underwood deposit. I made a rough estimate of what might be

(Testimony of Ira Judson Coe.)

developed [120] from the Underwood but I do not know what it was. I did not keep any record of that. I remember it and can still remember how that ledge looked in 1906.

My tonnage estimates to Mr. Henshaw were on the Flint and Underwood together. I have no specific recollection as to the separate properties and cannot separate them.

I did not examine the clay on the Chittenden ranch in 1906 and never did thereafter. I did examine it in 1904 and found plenty of clay on that ranch. It was of good quality but it was not necessary for the San Juan plant. It could have been used but I found it would not be necessary to use it. Mr. Henshaw knew that it was there and it is not likely that I made a recommendation regarding it. Mr. Henshaw knew that they were drilling for oil on that ranch at that time.

Referring to petitioner's Exhibit 2 the three deposits are marked off in red on the map. I stated that the deposit actually covered about 5% of the area which is in the Underwood deposit. The property known as the Underwood is where the words Cronojo Cablian occur on the map. This property is indicated by the figure 1 in blue pencil on the map. In other words, the property enclosed in a red line and marked No. 1 in blue pencil represents the Underwood. The exposures on the surface covered about 5% of this area. Yesterday I testified that the exposures [121] on the Flint property

(Testimony of Ira Judson Coe.)

covered 10% of the area. I am marking the Flint property on the map with a figure 2 in blue pencil inside the red line. The black lines shown on that map, (Petitioner's Exhibit 2), are the railroad that was built after 1906 but I do not know when. That is the road that leads up to the Underwood and Flint. I do not know when the school house shown on the map was built. Probably before 1890. That school house was there when the United States Geological Survey made the surveys and they made the map. I think these maps were published in 1901 or 1903, because the map I am looking at is a photostat copy of the topographical map made and published by the United States Geological Survey. I know that it is a photostatic copy because I have had dozens of them made myself. There is nothing on this map to indicate that it is but my knowledge of topograph maps proves it to me. The only way I know that this is a copy of the topographical survey map is that I have had the originals, many of them, in my possession, and have worked with them over this country.

The line of railroad from the Southern Pacific to the plant, about 5½ miles long, has been built at some time since I first knew the property. From the plant there is what is known as a narrow gauge railroad up to the Underwood and Flint deposits which I call a quarry railroad. I do not know the dimensions of that railroad but according [122] to the map it is 3½ miles long. I don't know anything about that railroad. I have not run those quarries.

(Testimony of Ira Judson Coe.)

I have not inspected that railroad. I have had nothing to do with that property since Mr. Henshaw dropped out of it. Mr. Henshaw put three or four hundred thousand dollars in there and he dropped out of it. He dropped out of it because of dissension—worse than financial dissention. His money was returned to him. He had more than $300,000.00 in it. I remember one day going out of the office he said "Coe, I am going over to make the last payment." I do not know how much that was. That is the man's private business. I could get it if I were at home.

I do not officially know when the railroads were built or anything about that, and do not know what kind they were.

I am not a chemist. I know chemistry, especially cement chemistry.

My report to Mr. Henshaw relative to the property in 1906 was not a written report. It was an oral report. Whether I make an oral report or a written report upon examination of a property depends upon whom I am working for. My relations were not as a hired engineer really. My compensation was a retainer and I was on a retainer at that time. I have stated that I put the report in the file. I had my own file and I made my report and put it in the file. My file was in the Vice President's office—that is, [123] in Mr. Henshaw's office. I do not remember whether I made a written report in this case or not. I have not got my

(Testimony of Ira Judson Coe.)

file that far back with me. Nothing on the San Juan. I have made no copies of them. I have some stuff here on the Riverside in 1906; that is all. I did not find anything on the San Juan property. When I was called in on this case it was quite a job and I went back into the attic for those things. If I made a written report it should have been in the file and when they first called me I looked for it and I looked for some of the old photographs and everything else and opened them up in the office and they were not the pictures and photographs of San Juan.

Mr. Henshaw's associates already had property and it was a matter of whether he wanted to join them or not. That was the reason I made the report. I do not know when his associates acquired the property. Probably in 1905. Neither do I know from whom they acquired it. I only knew Senator Flint. He was a big land owner in that territory and I know he sold the Flint piece to the associates. I do not know whether he received cash or stock for it. He was a wealthy man and may have taken stock and glad to. That is, stock of the San Juan Portland Cement Company. I do not know the date of the organization of that company but the first I knew of it, it owned this San Juan property. [124]

Thereupon the following questions and answers took place:

"Q. (Mr. Adams, Attorney for Respondent). Now, you did not make any specific recommenda-

(Testimony of Ira Judson Coe.)

tion as to the value of this property to Mr. Henshaw in 1906, did you?

A. I did.

Q. What was that value?

A. What was what?

Q. What was that value?

A. Cash value?

Q. What was the value, I am asking you?

A. I don't get your question.

Q. What was the value that you recommended to him in 1906?

A. I did not recommend any value to him.

Q. You did not make any recommendation, then, as to the valuation of this property, known as the San Juan property, in 1906?

A. I recommended the investment.

Q. The investment, but you did not state how much?

A. I knew he was taking about a one-fourth interest.

Q. But you did not make any specific recommendation as to the value of the total property, did you?

A. How would I?

Q. I am just asking you if you did.

A. I have not my records.

Q. You don't remember whether you did or not?

A. I did on everything else. I must have on that property. [125]

Q. But that is the only basis you have for your statement that you did recommend?

(Testimony of Ira Judson Coe.)

A. That is sufficient.

Q. But you do not know what value you recommended, do you? A. I do.

Q. What was that value?

A. I put $1,000,000 on those deposits."

The witness then testified further as follows:

I did not take into consideration the amount that was paid by that Company for it including the Chittenden ranch. The Chittenden racnh was worth little or nothing if you were not going to use it for clay. It was only a ranch—clay and oil in 1906. They were drilling for oil on it in 1904 but I don't know about 1906. I think they had probably abandoned the drilling for oil in 1906 because the man who was drilling on that property in 1906 evidently had quit that work and had become interested in a piece of property down at San Luis Obispo, later known as the Palmer Oil Company, and this same crowd of men took the Palmer Oil Company as an adjunct maybe, as a supply for their oil for the San Juan plant.

I estimated 2,000,000 tons of rock in this piece and recommended a value of $1,000,000.00 on it. I took into consideration that there was a factory site there as being part of the $2,000,000.00. The factory site was probably worth $10.00 an acre as a factory site. I can't see that they use 160 acres for a plant-site. [126]

Thereupon the following questions and answers took place:

(Testimony of Ira Judson Coe.)

"Q. (Mr. Adams, Attorney for Respondent). Do you mean to say you recommended that, in your opinion, that property could have been sold on the market for $1,000,000 cash at the time you made the recommendation?

A. No; not for cash, but it may have been sold on a royalty basis for fifty cents a ton. They were paying at Tehachipi at that time fifty cents a ton for limestone, and hauling it four or five miles in wagons and bringing it down to the railroad, to Tehachipi, and then loading it on trains and shipping it to San Francisco.

Q. Who was purchasing it at that time?

A. A man by the name of Snyder.

Q. How much of it did he purchase at that price?

A. I don't know. I know he was buying limestone.

Q. In any quantity?

A. Not a very large quantity.

Q. Just a little bit to help out a plant that was industrious; is that it?

A. Well, in 1902 we did not have very many people on the Pacific Coast. Land outside of Los Angeles was worth $20 an acre. Today it is worth two or three or four thousand dollars an acre.

Q. You do not know of any plant in 1906 that was paid fifty cents a ton for limestone?

A. They were paying twenty-five, little contractors, and shipping it on steamers to San Francisco Bay.

(Testimony of Ira Judson Coe.)

Q. Just in very small quantities, was it not?

A. Well, small quantities—nothing like we used to mine up at Franklin Furnace, Pennsylvania."

The witness then testified further as follows:

When I said a million dollars, I did not [127] mean that he would be justified in going out and paying a million dollars cash for that property but it would not have hurt if he had. It was my thought that the property could have been operated and a million dollars made out of it. [128]

It could have easily made a million dollars from the operation. Riverside has paid $15,000,000.00 if it has paid a nickel.

I recommended this deposit to Mr. Henshaw as worth $1,000,000.00 when a year previous to that time I found a deposit of 2,000,000 tons close to the railroad and actually bought it for $55,000.00. I bought it and after I proved it up I told Mr. Henshaw it was worth $1,000,000.00 to him. The people I bought it from used to say that nothing but a poor Eastern sucker would have bought it, but afterwards they said they sold it too cheaply and I should have paid two or three times that much for it. I said "The price made no difference; we wanted the property." They did not think I paid too much for it when I paid $55,000.00. They thought they were unloading on an Eastern sucker. In other words, they thought they had just "stung" me for $55,000.00 and sold me a glass diamond for that amount. They were cement people. One of them today is the Vice President of the Southwest-

(Testimony of Ira Judson Coe.)

ern Portland Cement Company. Another is old Carl Leonard, one of the finest cement men California ever knew. He was one of the most experienced and most wonderful men we had. I actually bought this property for $55,000.00 in 1905 which I estimated would represent 2,000,000 tons of limestone and some acreage of land, but to my view the acreage of land was not worth at that time $10.00 an acre at Riverside. [129] You could buy the flat land—I bought one piece of land at one place for $25.00 an acre. I knew there was 2,000,000 tons of limestone to my own knowledge. The other cement men in that section had lots more time on it. I had two weeks to examine it and they had you might say a lifetime. You might say that they in a lifetime had not determined that there were 2,000,000 tons on it but that I had done so in two weeks. I was that smart but I was nervous afterwards—not very nervous but I wanted to be sure it was there after I bought it. I was sure of it myself. Then less than a year later I said that this property known as the San Juan property was worth $1,000,000.00 consisting of the same tonnage of limestone.

I do not know of anybody at that time who made an offer of $1,000,000.00 for those deposits of 2,000,000 tons. Anybody that offered it would be a fool, but I know that 2½ years ago there was an offer of $850,000.00 for a little piece of limestone in California 100 miles from Los Angeles. The man that owned it said "I am not interested in it. I

(Testimony of Ira Judson Coe.)

will ride with you. I will take stock. I will take a royalty per barrel but I will not take $850,000.00 for this property." That is what limestone is worth in California. I would rather have a limestone deposit than a gold mine.

The limestone in the Eastern part of the United States is all valuable, but the value per ton is [120] not the same as in California because there is a sufficient supply in the East. There is no large quantity of cement shipped from Japan to San Francisco. We had no Japan cement. There may be a little one time or another but it does not come now. Our cement from foreign countries is from Belgium and Sweden. There was quite a little shipped in at that time from those countries. You see they can lay their cement down from Belgium by water to San Diego for less money than the Railway Commission will allow the railroads in California to haul it from say Riverside to San Diego. I do not know what the price of cement in the East was in 1906. The United States Government publishes that every year. It was worth $1.50 per barrel at the works in California in 1906. I looked that up and know, for the first 11 years before 1913 that the avearge price by the United States Government records is $1.50 f. o. b. the works.

I suppose the Company that owns that property was organized as the San Jŭan Portland Cement Company. It was owned by Frank Brown and H. D. Wilson. The latter is now the president of the Great Electric Power Companies of the United

(Testimony of Ira Judson Coe.)

States. The Company must have been organized before 1906 because it was buying machinery in the fall of 1906. I was expected to employ the chemists—expected to have supervision. We placed the tentative order for all the machinery for that plant in 1906—Mr. H. T. Wilson did, of Brown & Wilson, who had their office in New York. [131] I do not know when that plant was finally completed. The fact that there has been testimony here that the first authorization was in 1918 does not refresh my memory. I don't know. That thing was mixed up so I don't know when it started.

The reason that it took so long a time to raise the capital to finance the plant was probably due to more dissension. When Mr. Henshaw was going into the San Juan, the project then was to have the plant on Puget Sound. When they returned, they talked of one at San Francisco, San Juan, one in Los Angeles, one at El Paso. The policy was for these men—there was practically $300,000,000 in the outfit—was to control the Pacific Coast and be the cement kings. Mr. Henshaw told me "All these men are all right, and everything else, and I am the natural man to be head of the enterprise. I will be the head; you will be my assistant." Otherwise, I would have done other work.

Mr. Henshaw could raise the cash among his friends or from the public. I did not estimate how much cash was to be raised before this plant could be successfully operated, nor the probalities of being able to raise the cash. It was not necessary,

(Testimony of Ira Judson Coe.)

because Riverside and San Juan were sister plants. They were both to be the same size, the same type of mills, the same structures all the way through. As I told you, I bought this machinery, the duplicate machinery [132] that was to go into the San Juan plant, the same as went into the Riverside. It was a time when there was a question of different methods of mixing cement, and being way out in that western territory we wanted no experiments. We wanted something that was thoroughly tried.

The property owned in 1906 by the San Juan Portland Cement Company and other property was sold at Sheriff's sale in December 1911 for $20,000.00. I don't know whether the sale covered other properties. I know Mr. Henshaw was out. He did not get any $20,000.00. He was already refunded his $300,000.00 and odd. They had spent $1,300,000.00. I have that from memory. I do not know what other properties they had acquired in the meantime besides this plant. The bonds of the San Juan Portland Cement Company were probably sold at a discount. All bonds are and it might be correct that its stock was sold at a discount also.

All of the freights in California are more or less under the control of the Railway Commission. The State of California is practically ruled and run by Commissions; All set-up by our now Senator Johnson. That equals the transportation cost of cement from one point to another. If there are equally located they get the same freight rate. I mean distance—all on distance. The Santa Cruz Company

(Testimony of Ira Judson Coe.)

gets the same freight rate as the [133] Old Mission. They have really a forced rate—a depressed rate as it is called, because they could load it on the ocean front and haul their stuff by barges or steamers into San Francisco. It was 2000 feet to the ocean front. I could probably throw a rock from the plant on to the ocean front. After it was developed it was all shipped by rail. They may have made one shipment by water to force that freight rate.

In 1908 some cement was shipped from some place in Kansas to California—mostly to Los Angeles. I do not know of any cement shipped to San Francisco from Kansas. The stuff that came into San Francisco in that period came from Salt Lake, Devil's Slide, which was near Ogden, and from Colorado. At that time there was only one plant in Colorado. It was called The Ideal Portland Cement Company and it belonged to Charles E. Boetcher. There may have been a second plant built in Colorado at that time. I can't remember. I was familiar with the cement industry in Colorado at that time. The Henshaw outfit was figuring on taking over the Ideal. We had an option on it at that time on the Ideal and the Devil's Slide near Ogden, Utah.

Referring to Petitioner's Exhibit 7, my valuation report, the 2,000,000 tons with which I started covered the Underwood and Flint deposits. It would probably cost a cent or two cents a ton [134] more to get the limestone out of the Flint deposit than it would the Underwood deposit, because of the cost

(Testimony of Ira Judson Coe.)

of carrying your rock on to the market one mile instead of three miles. After it is loaded it does not cost much. As I told you, they bring cement from Belgium and lay it down at San Diego pretty nearly as cheap as they can take it from Belgium to England, after it is loaded and in the hold. It would not cost much to move it then.

Moving the rock would necessitate the building of a railroad track. Every plant has to keep moving its railroad. All the plants have to do it and it is part of the expense of operation,—no more expensive than in any other industry.

In the second line of Exhibit 7 I estimate the cost of manufacture, labor, at 19 cents. I do not now know what labor was being paid per day on March 1st, 1913. This report which I have here (Exhibit 7) was made within the last month. Most of our labor in California in our quarries has been piece work and that was true at March 1st, 1913. By piece work I mean so much a ton for labor. Contracts would be let to the men to take out so much tonnage at a certain rate. In addition to the taking of the rock from the quarry, I took into consideration the labor at the crushing plant, at the grinding plant. It would all depend on your quarry [135] equipment as to how many laborers would be required to take out 2000 tons per day. Probably an average of 30 men. How you would take it depends on your equipment. When I used the figure of 19 cents for labor I had in mind steam shovel equipment. My figures of 19

(Testimony of Ira Judson Coe.)

cents are detailed. I could make the details, but 19 cents is the figure. It is our labor cost in a cement factory at that time. This happened to be the Riverside factory which is the same as the plant at San Juan. The Riverside is located about 50 or 60 miles from Los Angeles and used Mexican labor the same as used around San Juan. They are even running today with Mexicans. They do not have Japanese labor.

The figures I am using in this Exhibit 7 are as of 1913. I acquired these figures as at March 1, 1913. Labor was being paid the same from 1906 to 1913. There was no change and I am taking the period between 1906 and 1913 up to 1913. I have used a little lower figure. The 19 cents for labor is probably lower than it is today. I made these figures on figures that were available between 1906 and 1913. The average in 1906 was about 19 cents. It was 19 cents. From 1907 to 1913 they were practically the same. They remained constant. I took those figures from my own report on the Riverside Portland Cement Company which at that time was known as the Southern [136] California Cement Company.

I did not examine the books and records of the Riverside Portland Cement Company in 1913 for those figures. I got those figures from my own report made in 1906 and the figure of 19 cents for labor is taken from my report made in 1906. I am not telling you that I am taking the costs from the Riverside

(Testimony of Ira Judson Coe.)

operations. The Riverside Company was not in operation in 1906, but the figure was in my report when the Riverside Cement Company was being promoted. Those are my estimates of the cost at that time based on my knowledge of existing conditions. The figure of 19 cents in my report, Exhibit 7, is an estimate that I made in 1906 of what the labor would have cost at the Riverside Portland Cement Company plant, which was not then in existence. Neither was the San Juan nor the Old Mission in existence—that is, not in operation. It can be proved that my figures were correct. I did not bring any books or records here to prove it. They are not mine but they could be proven. It is correct that I have taken this figure from a report that I prepared in 1906 of what I estimated the labor would cost.

My estimate for power at 10¢ is on the same basis but I could figure your power for you sitting in the chair because it is so simple a child can do it. We paid $36 per year per horsepower. [137] We knew that we were going to use electric power. You could not use the oil from the Chittenden Ranch for power or crushing rock. You cannot use it because you have your power already laid down at your door by the hydro-electric companies. It was practically within two miles of this factory site at that time, in 1913. Everybody used it at that time for power. In 1913 all the limestone properties were being operated by electric power. The Napa plant I think was started in 1902 and they were using hydro-elec-

(Testimony of Ira Judson Coe.)

tric power furnished them by the Bay Counties Power Company. They reproduced the plant that was up here at Stockerton and when they reproduced it they brought everything with them except the power house. They put in two big generators instead of individual motors.

The power companies offered to sell us power guaranteed at $36.00 per horse power. That was probably in 1907. It was the same in 1913. It had not been changed. I don't know that but it was not changed until the Corporation Commission denied the power companies the privilege of selling the cement companies power at less than they sold anybody else. The power companies were very eager to take the cement load because it was uniform. It ran 24 hours and if a few kilns were [138] shut down there was no loss. They could shut the board off and forget it. My fuel price of 18½¢ is based on the report that I made in 1906 as to the probable cost of the Riverside Portland Cement Company. That is what the oil would have cost us at that place. In 1913 oil at San Juan could be bought for 50¢ a barrel. I estimated it for Riverside at 60¢ a barrel, so that this fuel rate of 18½¢ is taken from my report prepared in 1906 and corrected to the price of oil in 1913. Oil was 60¢ a barrel in 1906 and that would be 21¢ for power, figured on the same basis as I have figured the 18½ cents. The fuel I had in mind was oil. Oil was obtained on a property adjacent to this deposit—that is, near that property or behind it over towards the coast a little further. It

(Testimony of Ira Judson Coe.)

was piped over to the railroad on this Chittenden Ranch. It was very poor oil and was not suitable for power. It was very poor for fuel. I believe the company did take some of it and mixed it with their fuel. The best fuel for the cement business was what we call the residuum, the oil that they have taken off the top at their refineries and then we use that refuse.

In my 1906 report I think I show fuel at 21 cents. I have the report here somewhere in my file.

I have the figures here, but a correction should be made. I said that at San Juan it was figured [139] at a lower cost price than in my report on the Riverside property. The difference was 10 cents a barrel. The average cost estimated in my Riverside report was 60 cents a barrel. I used fifty cents a barrel in making this 18½ cent cost. My report on Riverside is dated February 20th, 1907. I used 60 cents as the fuel cost in 1906, at Riverside. This report was prepared for the Riverside Portland Cement Company. That 60 cents was reduced to 21 cents by taking the number of barrels required to burn a barrel of cement. In 1906 we figured about—I do not know. I could figure that up. We got a little better than say three barrels of cement out of a barrel of oil. I have to work it out again. We figured out that it cost 21 cents a barrel to burn it. It cost 60 cents for a barrel of oil. It took about a third of a barrel of oil to go through the burning of one barrel of cement. That is figured in 1907 and that is the estimated cost that I made.

(Testimony of Ira Judson Coe.)

The plants that were operating on the Pacific coast at that time were the Napa Junction,—the Standard Portland Cement plant and the Pacific Portland, both burning oil. I had that information. I also knew what it cost to burn cement in Nazareth, Pennsylvania, or eastern fields where we burned coal, and an engineer can take his coal cost and transfer it to the oil cost. The figures I used here were the universal figures used [140] by all engineers and cement people at that time. They were not all segregated. They were, as I have done in here, labor, power, fuel and supplies.

Now taking up the supply question, I have 12½ cents for supplies. That includes all supplies that go into the manufacture of cement; namely, the pebbles at that time for the pebble mill, the balls for the ball mill, the lining for the ball mill, the lining for the pebble mill, reproducing the crushing outfit, relining the kilns, renewals and things of that kind. That was the sum that we worked up and that was understood to be universal. Every engineer used practically 12½ cents. My 1906 report shows 12 cents as being the cost of supplies. I have used 12½ cents here believing that in the Riverside I had a gypsum account.

I have packing costs 5 cents. That is what it cost in the United States at that time. That was the average price of packing cement in the United States at all points. I knew that in 1907. In using a selling cost of 10 cents I had in mind the cost

(Testimony of Ira Judson Coe.)

of the sales department which includes advertising and expenditures necessary to obtain the business. I do not know about donations. It covers expense accounts to salesmen. Ten cents in 1907 was the general average of all the cement plants in the East.

Then I have overhead expenses 7½ cents. That [141] is the main office expense, bookkeepers, salaries of the secretary, treasurer, president. That gives a total manufacturing cost of 82½ cents and I can testify that that was practically the price from 1906 to 1913 of manufacturing a barrel of cement. It remained fairly constant during that period. The panic of 1907 and 1908 did not affect the cost.

The selling price of $1.50 f. o. b. plant, which I have in the report, was the selling price in that district from 1902 to 1913 as proven by the United States records. I obtained that from statistics. I also know that of my own personal knowledge, being in contact with the trade.

Then I deducted my estimated cost of 82½ cents which leaves a gross profit per barrel of 67½ cents.

In the next computation in that report I have "estimated gross profit per ton of raw material: gross profit per barrel of cement 67.5 cents; converted to per ton of raw material on basis of 3.2 barrels of cement per ton of raw material, equals, per ton $2.16." It is a fact that this report, assuming those computations are true, would give that value if the plant had started operations on March 1st, 1913, and continued without interruption or

(Testimony of Ira Judson Coe.)

any fluctuation in cost of 10 years. Then you would have a value for the rock of $1,645,568.00 on March 1st, 1913. [142]

The plant was there on March 1st, 1913, but it had not been fully completed. I think it was over half completed. I do not know when the tracks were built over to the Flint deposit. I believe the tracks were laid up there in 1913, now that I come back to it, because the rock was brought from up in the canyon for the concrete work when they were laying the foundation for the big kilns and the machinery. The road should have been built but not to the Flint deposit. I am speaking from a logical point of view. They would not build the railroad to the Flint property until they had exhausted the property of material on the Underwood. In making the computation you only figure the years that you are operating. This plant could have started in 1913 and gone ahead through except for the internal strife among the property owners. I am figuring my basis on the plant, that it was constructed and that it was built. My contention is that the plant was to have a life of 10 years and I do not care when it started. It may have been started in 1907. My contention is that the property had a 10-year life. I do not know why my computation would change upon the assumption that the commencement of operations was deferred for five years. I think I would still arrive at the same value. In reply to the question as to whether this property would be entitled to a return

(Testimony of Ira Judson Coe.)

of interest on the investment for five years [143] before it was producing, I know of another property that is not being developed and the man that owns it is marking up his profit and interest on that property every day. Every year it increases in value. If you waited until this property was ready to start, it would be worth more than it was in 1913. Limestone was getting better and more valuable as the years went by and as the deposits were depleted. Limestone in California is worth more today—nearly twice what it was in 1913; maybe three times as much. There was no depletion in Southern California in 1906 but the two plants North that were closed here were practically exhausted you see and when you have two plants and you have a market to hold both of them and one of them drops out, the other certainly has an increased value. Limestone did not drop in price from 1905 up to 1913, in California and it should have increased. To say that it did increase in value I would have to find some specific place where it did increase in order to answer your question but it went up from 1909 to 1913. I do not know the percentage of increase. I have an idea but cannot state it in percentage. No large deposits of limestone were discovered in and around the Bay District of California between 1913 and 1923 or 1924. The field was pretty well surveyed by 1913. In making my estimates [144] I made no allowance for the possible discovery of additional deposits but it is practically impossible to make more dis-

(Testimony of Ira Judson Coe.)

coveries because we knew that country—that part of the world, you see, was adjacent to the University of California. The geologists had covered it thoroughly and we had a very good knowledge of what there was and what was to be expected. In fact, two universities—Mr. Hoover's university was right in the midst of it. 8% is a fair return on an investment of $2,645,568.00 in limestone rock. Mr. Henshaw made such an investment practically in 1907. 8% as I figured for 10 years and the money returned at the end of that time is not a bad investment. It is a safe investment. I would say that that would be a safe investment in limestone rock in the ground.

On Re-Direct Examination witness Coe testified as follows:

I testified on cross examination that the town of Riverside was farther from the Riverside Company than Highgrove and Bloomington. I did not testify that the Riverside plant was built at Riverside. The plant was at the deposit out there at West Riverside and the railroad was built both to Riverside and also to Bloomington. The property was connected by a short line that went both ways—trans-continental. The plant was at a little town called Crestmore and still is. [145]

The price of $55,000.00 paid for the Sky Blue Marble Quarry was a bargain purchase. I do not consider a forced sale of limestone by sheriff as necessarily representing fair market value. If I remember correctly, the San Juan property was

(Testimony of Ira Judson Coe.)

bought at sheriff's sale in 1911 by a committee of the bondholders for $20,000.00. The bondholders themselves bought the property in.

I took over the Riverside property. The option was exercised the first few weeks of January, 1906, and I was drilling the property or having it drilled in May, 1906. The diamond drilling took place after I exercised the option.

HERBERT COFFMAN, a witness on behalf of Petitioner, testified on Direct Examination as follows:

My name is Herbert Coffman. I reside in Philadelphia,—a suburb of Philadelphia,—and I am in the Portland Cement business. I am in the Portland cement business and have been for a little over 30 years. I graduated from the University of Pennsylvania in 1900 with the degree of Bachelor of Science and Chemistry. My first employment after leaving the university was as a chemist with the Alpha Portland Cement Company from 1900 to 1905. The Alpha Company is located at [146] Easton, Pa. That is where its main office is now. At the Alpha plant I was assistant chemist for three years and then chief chemist. I was chief chemist at No. 3 plant at Martin's Creek. My specific duties were to follow the manufacture of cement during all times from the start to the finish. During the process of manufacture I made an analysis of the ingredients

(Testimony of Herbert Coffman.)

that went into the cement. I made the tests and supervised all of the tests of the cement after it was manufactured up to the time it was shipped. The purpose of that supervision in making tests was to maintain the quality.

After leaving the Alpha Company my next employment was as Chief Chemist with the Cayuga Lake Cement Company, at Ithica, New York. My duties there were similar to those at Alpha. I was there until 1907 when I left and went to the Riverside Portland Cement Company at Riverside, California. That is located in Southern California about 55 miles East of Los Angeles. They were starting a new plant there and required the services of a chemist. I was Chief Chemist there. Mr. I. R. Coe was the consulting engineer the greater part of the time that I was at Riverside. I was there until 1914, my duties as Chief Chemist being substantially the same as those I have described at Alpha as far as supervision of the plants was concerned. In addition to those duties we did quite a bit of prospecting [147] work while I was located at Riverside to locate additional deposits of limestone. We were looking for additional deposits of limestone and also gypsum deposits. Anyone that was interested in the production of Portland Cement on the coast would be interested in finding any limestone deposit sufficient to warrant the building of a cement plant. Such deposits were not very plentiful.

I know how many plants were operating in Cali-

(Testimony of Herbert Coffman.)

fornia at that time. Up to 1913 in Southern California there was the Riverside plant and the California-Portland Cement mill at Colton. Then there was the city plant known as the Monolith. The city of Los Angeles plant, now known as Monolith. Then there was a plant at Santa Cruz, the Pacific-Portland Cement Company, and the Cowell Cement Company plant at Napa Junction which was under the same interests as the Santa Cruz. I believe that covers the plants that were under operation at that time.

When I left the East to accept this position as Chief Chemist of the Riverside-Portland Cement Company I had been notified that the same interests had an interest in a deposit at San Juan and I went out there with the understanding that if this plant ever operated I was to be Chief Chemist of both plants. I was never on the San Juan property between 1907 and 1914, [148] but I knew about it in 1907 when I went West. I did not know the quality of the stone in the properties from an analysis at that time.

When I left the Riverside in 1914 I established a consulting chemical laboratory of my own in Riverside and I continued in that place until the Fall of 1918. During that time I was doing consulting work and analytical work and making tests of cement and examination of properties. I was just like any other chemical laboratory. I was ready to go out on any job on which I was employed. I was not personally looking for any deposits—that is, of limestone.

(Testimony of Herbert Coffman.)

I did some work for the State of California and my report went to the Commissioner of Corporations of that State. In 1916 I was requested to make a test of the material of the proposed cement plant at San Juan. I examined the property at that time and personally took samples and analyzed the materials. There were four workable deposits there that I went on, three of them being designated the Barbee, Underwood, and Flint deposits which are involved here. I was on those particular deposits, the fourth property being on an adjacent property. I personally examined the three deposits and analyzed samples and made a report which consisted of a chemical analysis of the materials. The [149] report was made in order to prove up the quality of the material for the manufacture of Portland cement. It was made on account of money being raised and the promotion of the cement plant. The Commissioner of Corporations had to have data regarding the feasibility of the proposition. As far as I understand, the Commissioner of Corporations had to know that it was a bona fide proposition before the plant could be promoted,—that is, before it would permit the corporation to operate. I was not personally engaged by the Commissioner of Corporations but I was engaged to make this report which was submitted to him. The report was in the nature of a chemical analysis of the limestone samples and was favorable.

After examining this property and making this

(Testimony of Herbert Coffman.)

report I accepted a position as Chief Chemist at the Hercules Cement Corporation, near Nazareth, Pa. I was there until 1918 and my duties were similar to those performed at the other places.

My next employment was as Chief Chemist of the Old Mission Portland Cement Company, California. Later I was Superintendent as well as Chief Chemist. Then I was transferred to the City Office as Sales Manager. I worked for the Old Mission Company until 1927, that company being the petitioner here in this [150] proceeding. Since that time I have been Research Engineer for the Hercules Cement Corporation with headquarters in Philadelphia—the same corporation that I formerly worked for. I might explain my duties there a little simpler if I stated my title. My title might be assistant to the President. I have supervision of the manufactures at the plant. I am the service engineer as far as rendering service to outside concerns that are using our product or who we hope will use our products. Many problems come up in the use of cement and people call in for consultation on any questions arising. There is an association among cement manufacturers known as the Portland Cement Association. Our company, the Hercules Portland Cement Company, is a member company and I represent it on the Conservation Committee of the Portland Cement Association. The Conservation Committee is composed of about 20 people appointed by the President of the Portland Cement Associa-

(Testimony of Herbert Coffman.)

tion from among the employees of the membership. They are representatives from the various members.

The Conservation Committee has in its employ two or more engineers who make investigations at the dictation of the committee regarding processes of manufacture, checking up results, the operation of mills, the different kinds of grinding mills in the cement plant—for example, burning conditions—with the idea of finding out modern developments in the [151] industry so that the member companies will have the benefit of any information obtained to reduce the manufacturing cost.

Thereupon the following questions and answers took place:

"Q. (Mr. Goodner, Counsel for Petitioner) Were you a stockholder in the Riverside Company of California while you were in their employ?

A. I was.

Q. Do you recall how many shares of stock you owned?

A. Fifty.

Q. Did you ever receive any information as to the operations of that company or ever receive any dividends or anything of the kind?

A. I did.

Q. Do you know what the profits of that company were while you were there?

A. I can not say positively.

Q. Do you know the profit that was realized on a ton of limestone or a barrel of cement?

(Testimony of Herbert Coffman.)

A. I know the figures for the profit on a barrel of cement over a period of years.

Q. That is what I want. What was that?

A. In 1910 and 1911 it was 55 cents a barrel.

Q. When you say 'profit', just what do you mean?

A. That is the cost of manufacture, sacking of the cement, f. o. b. cars, and the profit after the sales cost and overhead are removed, taken off.

Q. You say that was 55 cents a barrel?

A. Yes.

Q. Does that profit include any allowance for depreciation of plant or for plant construction or not?

A. No." [152]

The witness thereupon testified further as follows:

One ton of material will give approximately 3.3 barrels of finished cement. Reducing that profit to barrels it would be 3.3x55¢ or $1.81½ per ton. In order to recover the cost of a plant of the capacity of Riverside that was earning this profit it would take about 5% a year for depreciation. The plant that was first started there had a capacity of approximately 2,000 barrels which would mean an investment of about [153] $1,000,000.00 at that time. At the rate of a million dollar investment on a plant with the capacity of 2,000 barrels of cement a day, it would require 600 tons of material a day which would be in a year approximately 200,000 tons of material. A depreciation rate of 5% a year, to write it off in 20 years, would be $50,000.00. That divided by 200,000 tons would be the equivalent of 25¢ a ton. Then taking 25¢ a ton from the profit per

(Testimony of Herbert Coffman.)

ton, that I have figured out, it would be $1.56½. That is my testimony as to the profit that the Riverside was making during the year 1910 and 1911. There is no deduction there for what we term depletion.

I would not say that was the selling value. To determine the selling value of limestone having those profits it would be necessary to take into consideration the erection of a plant and the returns spread over a period of time of that material. I have no basis for computing that. In my opinion limestone that was making a profit at that time of $1.56 per ton would be worth a minimum of at least half of that figure. I would say that that would be in my opinion the minimum value. I base that on my opinion on the knowledge that I have obtained in my 30 years experience in the cement industry.

I knew of the various plants that were operating in 1913 and had knowledge of the location of [154] the San Juan property. It was favorably located for operations and it is my opinion that it could have been operated successfully at that time. It would compare in operation equally favorable with the Riverside plant which we were operating. It is my opinion that you could have derived as much profit out of the operation of the San Juan plant as you could from the Riverside and I would say that the value of the limestone at San Juan was as much per ton as it was at Riverside. If anything, I would raise the figure in the light of my subsequent experi-

(Testimony of Herbert Coffman.)

ence since there and since 1913. Looking back through my experience and knolwedge now I would raise that figure if valuing it now. In the light of my operations and other experience, I would increase that figure over 30%. Half of $1.56 is 78¢. If I were valuing that in the light of my present knowledge I would increase it about 30%. The 78¢ would apply as of March 1st, 1913.

The industry on the Pacific coast, and particularly in California, in 1913, or on March 1st, 1913, was growing rapidly and the prices were going up and the net returns were greater. The industry looked favorable at that time.

I stated that I was Chief Chemist, Assistant Superintendent, and Sales Manager of the [155] Old Mission Portland Cement Company during the period I was employed by it from 1918 to 1927. As such I had something to do with the business policy with regard to donations or contributions made by that Company. I was familiar with that situation. I made recommendations as to the donations that should be made or the policy that the Company should pursue in making those donations.

In 1923 the Old Mission Portland Cement Company made a donation of $1,000.00 to the San Francisco Community Chest which was very similar to the organizations here in the East. Instead of having different associated charities coming around from time to time and asking us for gifts and donations, it was all put in one lump and we had one visit a year. It was practically a necessity to make

(Testimony of Herbert Coffman.)

the donations. We were all expected to contribute,—all the organizations. All the companies were expected to contribute to the Chest as a means of handling it in one payment. When I said that it was practically a necessity, I meant that publicity is given to the contributions and when we make a contribution it is published,—all the contributors. If we were not on the list we would be overrun with people coming in there and wanting to know what was the trouble—why we had not contributed and put us to quite a bit of annoyance. Our biggest [156] market for the output of the San Juan plant or the Old Mission plant was San Francisco. It certainly would have been a reflection upon our Company not to have donated this thousand dollars.

In 1924 we donated $1,000.00 to the Community Chest. That is the same amount that we donated in the prior year and the donation was made for the same reason and the same circumstances surrounded the giving of it.

In 1925 we donated $1,000.00 to the Community Chest. What I have stated heretofore would apply just the same to this donation.

I believe I stated previously, describing some of the donations, that we were called upon by the different organizations in there and having tickets for sale. Just as a matter of business policy we considered it necessary to make certain purchases which we have done. The same situation exists all over the country. It is a necessary part of a business.

(Testimony of Herbert Coffman.)

Thereupon the following questions and answers took place.

"Q. Is it your opinion that a business could not successfully operate without making those expenditures?

A. I would not want to be the one to try it.

Q. Do you think it would be disastrous?

A. I do."

On

Cross-Examination

witness testified as follows:

I was Sales Manager of the Old Mission Portland Cement Company in the years 1923 to 1926. I was not an officer of the corporation. I was first employed as Sales Manager in 1922. Mr. Harry Probert was Secretary in 1923 and Mr. William F. Humphreys was President.

In 1923 the Old Mission Portland Cement Company made a donation to the Community Chest of $1,000.00, which was for the Associated Charities and allied bodies. I don't know the members of the Associated Charities but instead of making the individual organizations come around and ask for donations it was all boxed in the Community Chest and the Community Chest made certain percentage donations to these allied charities and they agreed not to go out and solicit funds besides the amount that they received from the Chest. One of the objects of the Community Chest might be to raise a fund to take care of persons in distress, to clothe and feed

(Testimony of Herbert Coffman.)

people in distress in the City of San Francisco. I don't know the object of the different allied charities. When the Company made this donation it could probably have found out what purpose it was going to be expended for by looking at the record. I was not consulted at all about this [158] donation of $1,000.00 when it was made in 1923. I was not an officer of the corporation at the time and was not an officer during the years 1923, 1924, and 1925.

It is also true that I was not consulted about the donations made to the Community Chest in 1924 and 1925. I do not know whether the officers of the Old Mission Portland Cement Company made individual contributions to the Community Chest in 1923 or not. Neither do I know whether they made individual contributions in 1924 and 1925.

I went to California in 1907. I was employed out there by the Riverside Cement Company located near Los Angeles, California. That Company was constructing a cement plant in 1907 which was completed in 1909 and was not operated until the fall of 1909. The Company's business was to manufacture cement. It had a limestone deposit located near Riverside, about 55 miles East of Los Angeles; San Francisco is North of Los Angeles.

The Riverside plant was not located in the mountainous section. It was on level land and the deposits were in hills.

My duties were those of Chief Chemist throughout my employment by the Riverside Company. I

(Testimony of Herbert Coffman.)

was familiar with the limestone deposits which the Riverside Company had but I could not expressly say what tonnage they proved up at that time. I had an [159] idea as to the tonnage at the time. I had the record of the drilling in mind.

The Riverside was not a large company at that time but there were prospects for development of a large company. I do not know the area of land that it covered nor when they acquired the land. I know nothing about the cost of the limestone deposits to the Riverside Cement Company.

I have testified that there were a number of cement companies located in California in 1907 and thereafter. The Riverside Cement Company was one. I do not know when it was organized, but I went with it in 1907. They did not complete their plant and start operations until the fall of 1909. Los Angeles was the principal market for the Riverside Cement. I stated that it was 55 miles away. It is a little closer than that because the plant was between Riverside and Los Angeles. Los Angeles itself is about 55 miles. It is probably nearer to 50 miles from Los Angeles than 55. The Salt Lake Railroad was near the Riverside plant; also the Southern Pacific and the Santa Fe. I cannot tell you the distances to each one of the three railroads but approximately 5 miles or less to some of them. I believe the Santa Fe was the farthest away and I don't know whether the Salt Lake or the Southern Pacific was closest, but the Riverside [160] made another connection with the Southern Pacific after I left.

(Testimony of Herbert Coffman.)

I was employed at the site of the plant so I have certainly been on the plant. There was a connecting railroad line there that ran from the plant into Riverside. There is a line that runs in there—a trolley line—that was operated into Riverside.

I know the layout of the lime rock at Riverside—how far it was from the plant. It was right adjacent to it. They quarried the rock which was just adjacent to the burning. The plant had a capacity of 2,000 barrels a day when they started. They increased the capacity to almost double that amount, to 4,000 barrels per day. I do not know when this was done. I do not remember the year but I do know that their capacity in the fall of 1909, which was their first production year, was approximately 2,000 barrels a day. It was the same in 1910 and I believe it was the same in 1911. I do not remember the exact date when they added the additional kilns. I do not know what the capacity was in 1912 because I do not know when they added the additional kilns.

I do not know what cement was selling for in 1909 per sack nor in 1910. I do not know what price it was selling for per barrel. It was sold by [161] the barrel. I do not know what the market price for cement in that section was in 1909 and up to 1913.

There was another plant located in the neighborhood by the name of California Cement Company and there was another plant, the City Plant of Los Angeles. The Colton plant (California Cement Company) was about 8 miles farther than the Riverside plant. I neglected to mention another plant that was

(Testimony of Herbert Coffman.)

at Ora Grande. I believe it is called the Golden State Portland Cement Company. It is a small plant and farther from Los Angeles than the Riverside. Those three plants were farther away than the Riverside. Other cement companies located in California in 1909 to 1913 besides the ones just mentioned were the plant at Napa Junction, Santa Cruz, both of which are large plants, located at Napa Junction and Santa Cruz. They are in the northern section and supplied the same San Francisco market. The Santa Cruz was about 125 miles, roughly I' would say, on the Southern Pacific. The plant was located at Davenport and not at Santa Cruz and it was a large plant. I believe the plant at Napa Junction was on the Southern Pacific. I am not sure about that, and there was a plant at Suisun. I don't know the exact distance of the last two plants [162] but within a radius of 70 miles from San Francisco. The latter was a medium sized plant. Their market was at San Francisco.

There was the Powell Lime and Cement Plant located at Powell, within 60 or 75 miles of San Francisco. I am not sure what railroad it is on but San Francisco was its market. I think that is all the companies that were in operation between the years 1909 and 1913. The Pacific Cement Company is the Suisun which I just gave. The mileage from San Francisco is about 60 or 70 miles. That was a fair sized plant.

Going back to the Riverside Cement Company, I stated that I was employed by it from 1907 to

(Testimony of Herbert Coffman.)

1914 and that I knew the Company made a profit during its operation. I stated that I received dividends. I did not receive a dividend in 1909 and I don't believe I did in 1910. I don't know when I received a dividend and I don't believe I received one in 1912. I do not know when I received my first dividend. It may be that I did not actually receive a dividend in 1912.

I testified that the Company was making 55¢ a barrel on cement during the years 1910 and 1911. I know this because I remember that was the lowest figure they ever made. They always made over 55¢. I don't know from whom I obtained those [163] figures,—it was so long ago. The fact that they were making 55¢ a barrel on cement in 1910 and 1911 came to my mind recently when the subject was brought up. I do not know whether the Riverside Cement Company reported any profit like that to the Government for tax purposes. I did not have charge of the books and records of the Company and was not consulted about how they should be kept. I do not know how they were kept. The expenses considered in determining this 55¢ per barrel for cement profit were the regular expenses of the manufacture of Portland cement. I know this because it is the way they always kept their accounts. I just presume that that is the way they kept them. I suppose they used the regular method in the computation of cost. I do not personally know that but I have no reason to believe otherwise. I do not know the cost to the Riverside of the land, the lime rock, or the

(Testimony of Herbert Coffman.)

machinery and equipment used by it. As I stated, that figure of 55¢ a barrel did not include depreciation or depletion. I say that because ordinary cost items do not. I am not a cost accountant but I am familiar with the system of keeping the records of the cost of manufacture of cement. I have seen figures ever since I have been in the industry. I have never checked any of those figures. All I have seen is in statement form. My work has consisted principally [164] of that of chemist up to recent years. Up until 1922. That 55¢ per barrel takes into consideration the freight. That is the profit on a barrel of cement. The freight is deducted. I was not talking selling prices. I do not know the cost of manufacturing a barrel of cement in 1909 to 1913. When I was figuring a 5% depreciation I was speaking of a million dollar plant. I testified that I do not know what the Riverside plant cost.

I testified that in 1910 or in 1911 their capacity was 2,000 barrels per day. It was subsequent to that, but I don't know the year, in which they increased the capacity. They increased their plant and increased their production to 4,000 barrels.

I used as a basis a 25-year life for the plant. There are continual changes all the time in plants, additional changes very often taking place under different operating circumstances. I have never figured the general rate of depreciation claimed on cement plants. I have never been advised by the company that they were charging 10% depreciation on plant equipment. If they did, and if 10% were correct,

(Testimony of Herbert Coffman.)

then my computation would be erroneous. The results would be changed. [165]

I testified that the Riverside was making $1.56 per ton for limestone rock in 1910 on the basis that I assumed of a million dollars as the cost of the plant and I proceeded on the assumption of 2,000 barrels a day and 5% depreciation. I have in my hand the calculation. I just took the assumption there of the production on the 2,000 barrel basis and the cost of the plant at a million dollars. I testified that I did not know what cement sold for from 1909 to 1913, but I know that they made a profit of $1.56 on each ton that they sold because I remember what the profit was per barrel. I assumed the profit of $1.56 per ton on the basis that I have just given, on a profit of 55¢ on a barrel of cement.

I do not know of any limestone rock that was sold in 1909, 1910, 1911, or 1912, for $1.56 per ton of stone in place. I do not know the price of any limestone in place. In fact, I don't know of any sales made in 1909 to 1913, inclusive, of limestone rock in place.

The quarrying cost would be one of the factors taken into consideration in considering the profit that would be derived from the manufacture of cement. That is not the initial purchase price. You do not take that into consideration. In the cost of [166] manufacture the first procedure is to determine the cost of manufacture. That does not start out with any set valuation of the cost of the limestone itself. You do not take the cost of limestone

(Testimony of Herbert Coffman.)

into consideration at all in the cost of manufacture. In 1909 to 1913, the labor in the quarry was contracted at so much a ton. I do not remember the rate paid in 1909. The Riverside Company quarried its clay used in the manufacture of cement upon its property adjacent to the rock.

This plant was about 50 miles from Los Angeles.

I would not say that I was only a chemist at the Riverside plant. I did a lot of prospecting work while I was down there. I was out all over the country frequently looking for deposits,—further deposits of limestone. We would get samples of limestone; someone would bring in samples that would show up good quality. Then we would go out immediately and find out the extent of the deposit. I was out on many deposits myself. I did not send anyone else for the final decision or the final report on the property. I have no personal knowledge of any deposits of limestone rock purchased by the Riverside Company in the years 1909 to 1913.

I have testified that I was at no time [167] during the period from 1907 to 1914, inclusive, upon the property known as the San Juan. During that period of time I never tested any of that rock or made an examination of any of the rock. The first time that I made an examination of the property now in question was in 1916. I testified that at that time I was called in to make a report as to the quality of the rock located on this property known as the San Juan. Frank Parker employed me to make this report. He was an operating man—a

(Testimony of Herbert Coffman.)

cement man, located at Riverside, California. Previously he was the General Manager and Superintendent of the Riverside Cement Company. He wanted that report to supplement his report to the Commissioner of Corporations of the State of California. It is hearsay (with me) that they were changing their financing and in order to get permission from the Commissioner of Corporations the cement plant had to submit certain evidence which the Commissioner desired. This property known as the San Juan property had not been operated up to 1916 as a cement plant. It had not been developed.

I stated that I made an examination of this ore in 1916. That was a chemical examination. In making this examination I went on the property and blocked it out—took surface samples. I did not drill to get the samples. Whether you take surface samples in making [168] an examination of lime rock depends on how the rock lies. You often take surface samples when the rock lies on edge so that you can take a cross-section of it. I took possibly between 50 and 100 samples. Each sample probably consisted of 25 or 30 pieces. These samples were shipped down to my laboratory in Riverside, pulverized down, and then analyzed by the standard methods of chemical analysis. I reported that the samples proved up to standard. That was the substance of my report. The limestone that I sampled was in place. I don't sample stuff that is not in place. I made no drilling for the samples. We took the samples from the surface and from the face of the exposures. I be-

(Testimony of Herbert Coffman.)

lieve there were some tunnels drifted in. I believe there were places on the other property where there were tunnels in there. There had already been prospect tunnels put in and I don't recollect on other deposits how much development work had been done at that time but I did not myself make any drill holes—put down any drill holes.

I don't know that I made any statement about where I made any drilling. It is the only means of proving up the property to put down drill holes. The preliminary work is to take surface samples and that was my practice back in 1913 and it has always been my practice. If the preliminary samples show [169] that the material is not fitted for the manufacture of Portland cement, we don't go any farther with it. If the samples should show up the proper composition, then you would put in tunnels and cross cuts and drill holes—diamond drill holes—and take the cores and make analyses of the samples, but my work in connection with this property was entirely that of testing surface samples and samples of a previous development; more or less a superficial examination. They were in a rush for the result and it was impossible in the short space of time to do any development work. I imagine that the purpose was to finance the company so that it could complete its plant and start operating, but that is just hearsay. The plant had not been completed at that time; that is, in 1916. The plant was completed in 1918 and that is the first time it began operating. I mean the

(Testimony of Herbert Coffman.)

Old Mission Portland Cement Company, the taxpayer here.

I testified that the cement business continued to prosper from 1909 up until the present time. It continued to enlarge and grow. The value of cement has increased from year to year. They had their depression but there has been a gradual increase in the value of Portland cement. That is, from 1909 on up to the present date. As I say, there were some peaks and some valleys, but as a general [170] statement cement rock has gradually increased from 1909 on up to the present time. I have no knowledge of how many cement industries were in the hands of receivers from 1910 to 1919 in the United States.

I testified that the profit from a ton of rock at the Riverside Cement Company on the figures that I used was around $1.56 and I testified later that I thought that property of the petitioner in this case was worth approximately the same value. I mean that it would be worth $1.56 per ton. No limestone in the ground would be worth $1.56. That was the profit on a ton of limestone that was made. They expect to make a profit of $1.56½ a ton on their material. I testified that the limestone in place would be approximately 78¢. That is just my opinion based on the experience that I have had in the cement industry. I have never bought or sold any limestone rock in place and I do not know what limestone rock cost the Riverside Cement Company. I do not know of any actual sales of limestone rock in place from 1907 to 1913, inclusive, in the State

(Testimony of Herbert Coffman.)

of California. I have already testified that I do not know what cement sold for from 1909 to 1913. I cannot give the figures. I testified that the approximate profit made in 1923 and 1926 on cement was about 30%. That 30% is based, I believe, on the returns from the Old Mission Portland Cement Company [171] in the last three years I was with it. When you ask me if business was very good in those years, I do not know what you mean by "very good". They always had trouble in disposing of the complete output; always had normal sales. There is where competition is such in the cement business,—Has been such in recent years that they are shipping far below their rated capacity. The petitioner here could have shipped more cement during the years 1923 to 1926. I do not know whether it is a fact that most of the cement plants have a capacity much greater than they expected to sell. There is general reference to the sales and productions in the cement industries in the past years. Production is away ahead of the sales. Operation is considerably curtailed and has been in recent years. The reason for the curtailment is over-production. Whether there was over-production in 1913 I cannot give the figures. They are Government records.

On

Redirect Examination

witness testified as follows:

There was no change in conditions between 1913 and 1916 out there at San Juan that could have

(Testimony of Herbert Coffman.)

changed the economic value of the limestone deposits in that time. They were the same in 1913 as I saw them in 1916. [172]

On

Recross Examination

witness testified as follows:

I know that conditions in 1913 were the same because if they had removed any rock I certainly would have noticed it. There wasn't any earthquake in the meantime that would upset any rock or roll it into the gulley. Some tunnels had been driven there but no rock had been removed. Just enough to crawl in and get small samples.

F. S. RICHARDS, a witness on behalf of Petitioner, testified on

Direct Examination

as follows:

My name is F. S. Richards and I reside in San Francisco and have lived there since 1926.

I am by profession a Consulting Engineer. I was educated at Olivet College, Olivet, Michigan, in 1902 to 1907. I graduated in 1907 with the degree of Bachelor of Arts, following a 6-year chemical engineering course especially designed for the cement industry. I had previously had an accounting course at Gatchess College at Detroit. After leaving Olivet College I went as Chemist with the Alpine Portland

(Testimony of F. S. Richards.)

Cement Company and followed there as Chief Chemist for the Hecla Portland Cement Company and as Chief Chemist for the Crown Portland Cement Company of Ontario. I was in those positions a little better than four years and was in actual control of the operations of the plant from the standpoint of quality [173] to a large extent, from the standpoint of quantity of output, the research and investigation necessary in development of new properties, also the care, while at Alpine, of the paper mill from the chemist control standpoint. On leaving these engagements in 1911 I became Superintendent of the Eagle Lime Products Company plant in Wisconsin. My duties there consisted of the actual production and management of the product, construction and re-construction rather, of plants and sales of the products. The Eagle Lime Products Company was the first rotary kiln lime producing plant in the country. I was with it about three years and next went with the Basic Products Company, Kenova, West Virginia, which was a smaller operation. At that time we developed the dead burn dolomite used as a substitute during the war for magnesite thus enabling the steel companies to continue their operations, or at least many of the open hearth furnaces to continue their operations whereas they had been seriously handicapped by the lack of magnesite. I was with the Basic Products Company about two years and left there in 1914, I think.

After leaving that engagement I did some con-

(Testimony of F. S. Richards.)

struction work for a few months in Huntington, West Virginia, right adjoining that plant; reinforced concrete construction, factory buildings, and also the research work for the glass companies of the district; [174] public lecturing and research valuation for the glass companies, and then joined the Dupont Company at Ripano. That was in November, 1915. I stayed with the Dupont Company only until the first of May of the succeeding year. While there I was in charge of the acid recovery section of the Ripano High Explosive Plant.

After leaving the Dupont plant I went to Australia, at the selection of Major Spachmann of Philadelphia, and stayed in Australia seven years. My business there was as works manager for the Kandos Cement Company and as assistant to Frank Oakton, Consulting Engineer for that Company and several other Australian companies. The nature of my actual work was the construction of the original cement plant and its continuous operation during the entire time I was there; the assistance and design and construction and operation of an additional plant at Brisbane; a grinding plant at Perth, and a grinding plant at Newcastle and a complete cement plant at Perth, Australia.

I left Australia in 1923 and spent practically the entire summer of 1923, including a [175] 10,000-mile trip throughout the United States, visiting various cement mills, cement mill properties and prospective properties, and other points of interest to

(Testimony of F. S. Richards.)

an engineer whose absence from the country over a period of seven years—to give him some contact with what was happening here. Incidentally that trip was financed entirely by the Australian Company in recognition of the services that I rendered it.

I stated that I spent the summer of 1923 in touring the United States and that I toured the principal cement producing fields of the country and many of the incidental or smaller fields. I spent my time familiarizing myself again with conditions in the United States. The purpose of all this was because of the fact that I had been absent from the country through a period in which the industry was rapidly developing and the opportunity that I had to play in the utilization of the English and German machinery. The revolution I had seen taking place in foreign cement mills led me to believe we should have somewhat similar experience in this country and I wanted to know from a personal contact with it how far that development had gone and where I might be of value in developing and utilizing the [176] experience I had had in the use of foreign equipment and contact with the foreign field.

After making this tour and familiarizing myself with the industry in this country, I became Superintendent in charge of construction and operations of the Cape Girardo Mill of the Marquette Cement Manufacturing Company, located at Cape Girardo, Missouri. My duties there consisted in general of being assistant in the design and complete supervision of the reconstruction of a mill which was

(Testimony of F. S. Richards.)

then in operation and in maintaining the capacity of that mill and rapidly increasing it, although it was under construction, which included every phase of cement mill operations. I was at the Cape Girardo mill a little more than two years, which would take me to 1925. The major portion of 1925 was spent in consultation work with the investigation of properties in Tennessee and Ohio, the re-design and some reconstruction work of Ohio Rock Producing plants.

Shortly after the first of January, 1926, I came to San Francisco, and have been there ever since.

I went to San Francisco to join Mr. Humphrey, Mr. Flyshacker and Mr. McCarthy, acting as Consulting Engineers covering a large group of [177] interests with which they were connected, being probably more closely associated with Mr. McCarthy who was general manager of the Old Mission Portland Cement Company. I acted practically as Mr. McCarthy's assistant and later became Assistant Secretary of that Company. Mr. McCarthy was Vice President and General Manager. I have been identified with the Old Mission Portland Cement Company practically continuously since that time so that I am familiar with the details of that company and its business since the beginning of 1926. I think I have reviewed the prior history of that company as closely as it was possible to do so.

The first work that I did when I arrived in California was to make a direct study of the properties owned by the Old Mission and immediately fol-

(Testimony of F. S. Richards.)

lowed it by a study of the limestone properties in Oregon, California, and Nevada. The various cement mills or properties that were operating in California in 1926 were the Old Mission, the Santa Cruz at Davenport, the Redwood City Mill and the Suisun Cement Mill. At that time the Calaveras Mill was under construction and the Yosemite Mill had equipment on the ground but was not under construction. There was the Cowell Mill, located at the foot of [178] Mt. Diablo. In Southern California the Riverside Company owned two mills—one at Riverside and the other at Ore Grande; the California Portland Cement Company with a mill at Colton; the Southwestern with a mill at Victorville, and Monolith, with a mill located at Monolith or more frequently termed Tehachapi.

I made it a point during that year to visit each of those operations and familiarize myself not only with their operations but with their mineral resources. I found that the limestone deposits lying within 100 miles of the population centers of Los Angeles and San Francisco are extremely scarce. They are all small-sized as a rule. Very few of them are of size warranting use even for limestone production let alone cement production. Their character is practically that of residual bodies of stone left after a very badly fractured and weathered geological period—practically no continuous strata deposits exist; that is even true of the entire state as well as of the immediate city vicinities or city territory. If we were to compare them with the

(Testimony of F. S. Richards.)

rest of the United States we might, I think, safely say that within a similar radius of 100 miles of practically every other population center of the United States there are hundreds of thousands of of times the amount of cement material [179] available near other populous center locations.

I have seen this map, (Petitioner's Exhibit No. 3), before. In fact, I placed the circles upon this map—made a few marks on it. I mean the circles about the size of a silver dollar. They are about 100 miles radius centered on the various population centers of the states and the may itself, the basis of the map, was a Government publication of 1910 entitled "The Principal Limestone Formations of the United States East of the Rocky Mountains and in California." I picked out the large population centers because they are the points of consumption for cement—the market point for cement. I limited the supply to 100 miles radius because distances greater than 100 miles run into the economic problem of transportation both either of cement or raw materials to reach the market and where mills are located close to the population centers they have a preferential condition over and above more distant mills due to the geographic freight location conditions. A deposit of limestone located away off from a population center could only be valued or might be considered in comparison with other deposits which lay closely near that market. I think the various mills that I enumerated a moment ago that were operating in California [180] were all

(Testimony of F. S. Richards.)

within the radius of 100 miles of San Francisco or Los Angeles. There is a possibility that one might lie without that radius. No, they all lay within those radii. I prepared the map, Petitioner's Exhibit 8, which was prepared to show directly the differentials that exist between deposits when judged from the viewpoint I have just expressed of their location, interpreted in terms of freight paid to common cariers. Of the plants I enumerated awhile ago those located in Central California and one of the Southern California mills are shown on this map and I prepared this map myself. This map, (petitioner's Exhibit 8), shows the location of the various cement operations which have a normal market in the population center of San Francisco Bay District. It also shows the location of the mills that had been abandoned, quarries that had been abandoned, one plant in Southern California, the nearest plant to the district; the location of the nearest limestone deposit of any size in Northern California. There is also shown on the map the figures indicating the freight rate per ton of cement from the mill to the population center and the rate of freight paid by the mills on the raw material from their quarries to the plants, paid to common carriers; the legend on the [181] map which indicates abandoned plants and quarries as compared with those that are operating at the present time —that is literally part of the picture. The location of the Napa Junction mill known at that time as the Standard and the Suisun Mill of the Pacific with its quarry abandoned, close to it and its labor

(Testimony of F. S. Richards.)

operation at Auburn. The figures that appear on the lines between the square spots and the center of San Francisco indicate freight per ton of cement to reach the market center. Those appearing between the square and the round dots indicate freight paid on raw materials to common carriers and the figures over in the margin, the first one at the top, $1.40 represents the freight per ton on cement. Then 85.1 cents on limestone or raw mixed—that is, reducing the actual freight rate to an equivalent freight rate per ton of cement to an equivalent freight rate per ton of raw material to reach the market; and similarly the $1.80 reduced means $1.09 on raw materials to reach the same zone. Then, in order to interpret the map so that it is readable, I have drawn there a comparison between the Old Mission deposit and these other operations. Napa and Cement have been abandoned although they were on the same freight rate as San Juan or the Old Mission, the cement plant operated in conjunction [182] with Auburn for a number of years paying 58 cents in freight to common carriers per ton of limestone. That was a direct common carrier charge. The Calaveras Mill next on the list paid 24.3 per ton of limestone which is the figure —the difference between the two figures—$1.40 per ton on cement and $1.80 per ton on cement reduced to limestone freight rate. That tabulation represents the differential in favor of Old Mission as compared with those other plants which lie in that district and serve the same territory.

(Testimony of F. S. Richards.)

I obtained the information which I have condensed on this map (Petitioner's Exhibit 8) through a careful study of the limestone plant situation of California and study of the freight tariffs in existence. Then that is applied to current tariffs of the 1926 period. However, I can say this—that there is but slight difference during the entire period. There have been two or three periods, war periods, and one period prior to that, when the rates were different but the average rates over a period of time are approximately the same. The question of freight on cement to freight on limestone is a matter of chemistry and mathematics and has been developed during years of operations. We know what the ratio is between a ton of limestone and a ton of cement. [183]

I prepared this map in October, 1930. I had the conditions as were known in 1913 in front of me. There are, as I say, in a few cases minor changes. However, rather than to inject those into a map which we wish to discuss it is better to give the facts as they existed during the major portion to the present time.

The map from which witness had been testifying was thereupon received in evidence as Petitioner's Exhibit No. 8.

The location of the San Juan or Old Mission property is shown on the map, Petitioner's Exhibit No. 3, by a mark. Somebody has marked it with a red circle—a small dot. That is the approximate location about as close as you can come to it. May

(Testimony of F. S. Richards.)

I add an answer to your question sometime back as to the relative limestone deposits of these individual territories; that the known tonnage existing in the San Francisco Bay District held by the cement companies and held by other holders, so far as I have been able to determine, if they could be consolidated into one body or four bodies, we will say, so that they might be turned into operations such as are operated by four plants that now exist in the Great Lakes Section of this country, they would serve as a basis of supply of fairly one year's operations. That condition has a very material [184] effect upon the value of the deposits.

The value of any deposit is dependent upon its location in regard to the market,—its accessibility, its workability as a deposit, and the competition it must meet from other deposits. In this individual picture as we have it, the San Francisco Bay District we have, even as of 1913, and an even more emphatically stress as of today, but really one limestone deposit in the Bay district of any extent, and that is the one in which the Old Mission and Santa Cruz operations are located, a broken deposit of about 25 miles or a little more in length, with a large gap in the center of it, nothing in it whatever only a few ragged remnants at each end; and on those two remnants are the operations of those two companies. There existed at one time three other deposits, one which had been worked out in 1913 at Cement; one which was being supported by rock shipped from Auburn and Santa Cruz

(Testimony of F. S. Richards.)

prior to 1913, to 1918, that was the Napa Junction, located at Napa Junction, and the Cowell deposits have always been questionable, but which were dragged down at an enormous expense for prospect work in order to reach an adequate supply of stone. Personal investigation of that deposit would show it is extremely close to its end at the present time; therefore, there remains in this district practically one location from which [185] material can be supplied. To get a further supply of cement material or limestone for this district we have to cross the Sacramento or San Joaquin Valley, in that foothill section of the high Sierras. We go into the northern end of the State, the most northern deposits known are around Kenneth, where they must assume a railroad haul of more than 275 miles, making it practically prohibitive to produce cement there and market it in San Francisco, so long as there is any cement to be produced within the 100-mile circle. Many years were spent, and many thousands, even hundreds of thousands of dollars, by the Pacific Portland Cement Company, the Old Mission and the Riverside, in search of near and supporting deposits. Auburn was chosen by the Pacific after years of work as the nearest deposit, and that deposit, as this map indicates, shows a cost of 58 cents for freight paid to common carriers, in order to supply its mill with cement. There was nothing else available that they could buy in the way of material at a less freight rate, and I might go further and say in order to operate the Auburn

(Testimony of F. S. Richards.)

deposit they had to assume the cost of a 28-cent additional rail charge, in order to reach the main line railroad, and a capital investment of more than a million dollars in order to get their deposit. [186] That was the investment for the railroad regardless of quarry and plant investment.

A little further south along the same range is the deposit operated by the Calaveras Company at the present time. That deposit was known to all of the companies searching for material and was turned down on account of its size. I speak of Calaveras and all of these deposits because I come personally in contact with them. I am consulting engineer for the Calaveras Cement Company. That Company has an operation which will probably not last more than six years in its present location, in the extreme, and it must go six and a half miles further to another deposit. Then it must go sixteen and a half miles further to be able to live out the life of an ordinary operation, and those additional distances are in rocky country where railroad construction will run to fabulous figures per mile of track, and for handling over that country. If we go a little further south we find several deposits of limestone, of small size, broken into large blocks, known as the Columbia or Angel's Camp district; U. S. Lime Products are operating there; it is not shown on this map. Their freight on limestone alone is $2.20 per ton, making their location in that immediate vicinity absolutely an impossibility; in that location, or 26 miles beyond, there was the location

(Testimony of F. S. Richards.)

shown by the Port Stockton [187] Cement Company, a promotion project which returned its collected funds to the stockholders at the order of the Corporation Commissioner recently.

At the entrance of Yosemite Park, or within a few miles of the entrance of the park at El Portal is another deposit known for many years. It was used as a promotion scheme to promote the Yosemite Portland Cement Company; a plant was started, but never put in operation; it lay idle for a number of years, with the machinery laying at Merced, up to a few years ago, when at the instance of the park company, who throughout thought they were going to use a lot of cement, that plant was finally finished and put in operation; it pays 60 cents a ton on the limestone from its quarry to Merced, it pays $1.20 a ton on clay to Merced; that deposit was originally turned down by many. I have read the reports of a number of engineers. I have investigated the property myself and knew before the Merced plant was built that they would have to have a special clay in order to get any kind of satisfactory cement. The limestone was a highly siliceous cement with practically no iron; they had to go to Ione to get a higher aluminae clay. They have therefore to absorb freight paid to common carriers of 84.3. If we take the actual rates paid on the combined material, [188] which is 90.3 per ton of freight paid to common cariers, the Monolith plant, which is a southern California plant, and only sells

(Testimony of F. S. Richards.)

a small amount of cement in the San Francisco Bay district, has to absorb $1.70 freight differential to get into the Bay district, which practically is prohibitive.

That completes a description of all the deposits in that part of California with respect to freight rates —all of the limestone deposits.

I prepared this map (Petitioner's Exhibit 9) from a copy of Pacific Portland Cement Company's sales data sheet furnished to their salesmen to show the actual existing conditions from time to time, in the freight conditions and price conditions. This I prepared purely as substantiating the data which appears on the map which I prepared as of February, 1928,—that is, Exhibit No. 8.

This map (Exhibit No. 9) substantiates map Exhibit No. 8 only in that it is a prior map and is of data that was in use by the Pacific and by the Old Mission Portland Cement Company at that period and we change it from time to time simply so far as freight rates are concerned.

The tabulation of figures on the bottom of this map (Exhibit No. 9) represents in the first place the location of the mill, miles from the population center which in this case is San Francisco, the rate per [189] ton paid, the revenue per ton mile to the railway, and the next column, per car mile, and the next column per car, the routing of the railroads it must be handled over; the authority for the tariff, whether issued, for which railroad it is issued by,

(Testimony of F. S. Richards.)

the tariff number, rating Commission's number, the California and the I. C. C. rating Commission numbers, the price per barrel of cement, showing the mill net as received by the various mills; first the price, then with the freight allowance, and then finally the mill net, which shows the direct differential, and those check with the differentials which I have used on this map here (Petitioner's Exhibit 8). The map which witness had just identified and testified about was thereupon received in evidence as Petitioner's Exhibit No. 9.

The information in the table on the bottom of this map (Petitioner's Exhibit 9) was supplied to me by the Pacific Portland Cement Company in the first week of February, 1928. I think I have compared the rates set out on the map with not only the current tables at that time but existing tables at the present time and with as many of the existing tables as I could locate dating back to even prior to 1913. Barring some of the war period when rates were shot up and a very short period about 1912, the rates are practically [190] uniform throughout the time. I might say that even during those periods that the differential between the rates was almost universal, meaning I checked no difference in differential between the rates during those periods. It was just an up and down rise or fall of the rates.

I have made a study of the proportion or relative increase of cement production and consumption as compared with population and have prepared a map or a curve sheet and this is it. (Petitioner's Exhibit

(Testimony of F. S. Richards.)

No. 10). This represents two phases; it represents at the very top the average mill price of Portland cement recovered by the California mills and the average mill price received by the mills of the entire United States from 1907 to 1927—from 1895 to 1927, barring one year which I did not get the figure for, on the United States average. The lower part of the curved sheet shows the United States cement production and the population curves, that is, from 1895 to 1930. That is the engineer's way of making it so that one can get the picture quickly as to what is actually happening in the matter of ratios without having to interpret volumes of figures. I obtained the information that is portrayed on this map largely from sources which are generally recognized in the engineering profession as being a basis for general determinations and general knowledge, Government publications, State publications, trade journals, which are generally recognized within the industry, records of the cement [191] association, which covers a large portion of the cement mills of the country, and somewhat from personal knowledge, and some of the data is on another sheet. I have given you records of individual companies as confirmed to me.

Thereupon the map which witness had just identified and testified to was received in evidence as Petitioner's Exhibit No. 10.

I have here another map (Petitioner's Exhibit No. 11) which I have prepared. This is the Cali-

(Testimony of F. S. Richards.)

fornia cement production and population for the same period as the other map (Petitioner's Exhibit 10). It was hard to put them all on one sheet and I prepared them in two sheets. That is, 1925 and 1930 population and production in California. This was prepared from the same sources and data except that in some respects information in that was supplied by possible records which did not appear in some of these others. The figures 1895 to 1930 across the bottom represent the years and the two irregular lines represent the cement production and population and to begin with the dotted lines——

The map which witness had just identified and testified about was thereupon received in evidence as petitioner's Exhibit 11. [192]

In viewing the upper figures, the upper graph curve, average mill prices of Portland cement, California and the United States, on Exhibit No. 10 you will notice that the upper or lightly dotted line representing the price of cement, which is the net price to the mill, in this case actually the price reported to the State of California for these years by the various mills, represents the net price received by the mills, while the lower curve, heavier curve, represents the price as reported for the United States. The curve indicates a higher price in California, almost 100 per cent at one time above —that is, above 1898, slowly dropping down to about 1900, in 1900 sagging farther, so that the eleven years prior to 1913, gives me an average of about

(Testimony of F. S. Richards.)

$1.50 per barrel, while the average price for the United States throughout the same period is almost fifty cents under that. If we were to interpret that in values of limestone, we would have more than $1. per ton, par value of limestone, as compared with the rest of the United Stafes, and let me make one comment, that the price for the United States includes the California figures in it; therefore it is higher than one might imagine for the rest of the United States—that is the consolidated return.

From that chart I cannot give you the March 1st, 1913, price because the returns were given [193] by the year, but the controlling price at that time, which would be the price dating from the first of the year; January 1st, was about the lowest period in California's experience—almost 98¢, compared with a much lower figure for the balance of the country and as compared with an 11-year average of $1.50 just prior to that time.

The tendency or prospect based on all known factors entering into the economic field, would indicate that the price situation as shown by those curves was due to some individual conditions, and that the market must recover itself. I think I can tell you the story as to why that dropped.

At that time, or at that period, despite the general depression throughout the country, peculiar conditions occurred in California so far as the average mill net of the cement mills was concerned. The City of Los Angeles undertook to build a cement plant to supply its cement requirements

(Testimony of F. S. Richards.)

for the aqueduct. So far as I can determine from a personal study of the situation and discussions with the engineers of the city, and the consulting engineer who handled it, the city was using that mill as a hammer to buy cement from the other companies; they could not produce it at anything like the figures that the other companies could, but they [194] used the mill to produce a small amount of cement and bought heavily from the other mills at a depresesd price, and that figure is directly reflected in that drop in the curve. I have examined the records of the northern mills and find that they do not show that drop in the curve on the average price for the State; however, I thought it advisable to use State records in making these charts. Further, as to indication, the cement production of the State had gone up rapidly and the consumption had gone up rapidly, from a consumption in 1895 of one-third of a million barrels, or one-third of the total cement consumed in the United States, in 1913, California was using about five and a half million barrels with a population of approximately two and a half million, or more than two barrels per capita. Looking at the curve for the United States we will see it was many years after that before the consumption for the rest of the country, or even the production, reached a figure of one barrel per capita; it was not until about 1923 that we reached that figure. That indicates that the construction and development projects were going ahead on the West coast at a much higher rate;

(Testimony of F. S. Richards.)

that was not only true then, but it has continued until in 1927 California was using about 14,600,000 barrels of cement with a population [195] of approximately 5,000,000, or almost three barrels per capita, whereas the highest average the United States as a whole has obtained has been a little better than one and a half barrels. That has a direct bearing in that it has held the industry in a healthy condition; it has induced people to invest money in the cement industry of the West when undoubtedly they would not have done so under poorer conditions. It has induced people at least to spent hundreds of thousands of dollars to find property wherein they could produce cement in California. It is interesting, probably, to know that the cement industry has grown from 1895, from about 1,000,000 barrels to nearly 175,000,000 barrels in 33 years, an increase of 1700 per cent placing it for a time second to the steel industry itself, and at the present time probably second to the automobile industry as a manufacturing industry, therefore establishing itself on a suitable and stable basis such as few industries have established themselves in this country.

Originally, in the earlier years of 1895 up to 1900, or in fact as late as 1902, the supply for San Francisco either came from the mid-west or eastern mills shipped in by rail or water, or was imported from foreign points; about 1902 the first actual [196] production of cement began on the West Coast,

(Testimony of F. S. Richards.)

with the Standard Portland, the Napa shortly afterwards, the Pacific Portland and Suisun, and the Colton mill of the California Portland Cement Company in southern California.

The importation and shipping of the cement from these distances that I have mentioned was expensive and it was somewhat directly reflected in the price being charged for that cement; when it came in from foreign countries, it came in as ballast, a condition we always have to contend with in the coastal district. The volume of cement used was extremely large, and it was not until about 1910 that mill production commenced to approach the requirements, in order to be able to force out the importation to any extent.

I have gone back pretty well over the history of the earthquake in San Francisco in 1906, and especially so in view of certain studies that were made during my first year in the West; the earthquake itself wipe out the downtown district, you might say, of San Francisco, below Van Ness Avenue, and covered a period of several square miles, eliminating all but about five structures. These structures were burned out, but they consisted of reinforced concrete qualities, mainly stone. They not only withstood the earthquake, but withstood the fire which followed, and from a building standpoint, or reconstruction standpoint, the railroads attempted [197] to alleviate the situation by reducing the freight rate on cement to $1.50 a barrel from eastern points. The growth of the city has been remarkable;

(Testimony of F. S. Richards.)

it is situated directly on the fault line. It has come back with buildings as large as thirty-six stories in height, and covering entire city blocks, developing new types of concrete construction, as time gone on, especially with the experience gained from the Santa Barbara earthquake and the Tokio disaster, until we believe in the San Francisco district ourselves that we know how to build buildings which normal tremors will not affect. Such disasters as occurred the other day in New Zealand probably would wreck most buildings, at least so displace them as to damage the community. However, we believe the buildings, even under these circumstances, would be safe for their occupants.

That knowledge has created a market for cement in almost every building that is constructed, from foundation to structural members to outside coverings, and the elimination of other building materials to a large extent, from the very heaviest of commercial and industrial buildings down to residences. They use more cement, without any question, in California than in any other part of the United States. That condition has continued and it is continuing at a more rapid rate, as we learn more in our buildings to overcome this situation; it is increasing. The demand of cement per capita, this shows [198] even in existing conditions today, with the depression in the United States, the depression of the mills in California, the falling off of consumption is even less than it is in other parts of the country. I might say that the Old Mission and

(Testimony of F. S. Richards.)

its officers have been materially and directly responsible for much of the engineering work lying behind those studies, cooperating with Stanford University, to a definite and expensive experimental equipment, and testing out various types of structural parts with that idea solely of improved structural conditions that must exist in any country where there is a hazard.

Referring to Exhibit 10, the price trend is shown directly on that chart. If you follow the California price, the light dotted line across the top of that chart, you will find from 1918 to 1927 the actual years for which the Old Mission operated, the average received by the various mills was $1.99 per barrel. That is the average over the period. So that in my opinion that temporary depression on March 1st, 1913, was not an indication that the market for cement, or the value of cement was going down instead of up. It was simply a local condition, or due to a local condition, on top of practically a national depression, business and real estate depression, and was only affected, of course, in the one year's sales.

I have investigated sales of limestone in [199] California. I think I have been in contact with practically all of the larger purchasers of limestone and in some cases have had access to their records, being consulting engineer for them, and have checked in many cases their sales. As to sales of limestone reflecting a March 1st, 1913, value for the

(Testimony of F. S. Richards.)

stone in place, let us take one instance from the Auburn quarries. The Pacific Portland Cement Company has shipped to the commercial limestone trade, that is, as we know it in California, the sugar factories, the smelters or refiners of metal, rather, instead of smelters, a reasonable tonnage, or at least a comparable tonnage. I can tell you the tonnage figure, that they have shipped 658,140.99 tons from 1916 to 1930, inclusive, to these various users of limestone, and their return before depreciation, that is, their profit before depreciation and depletion on that stone was $1.05 per ton at Auburn. You will recall from the little exhibit map which was presented, Exhibit No. 8, that Auburn is located in the northern part of the central section of the State, and the movement of sugar stone which constituted the major portion of this movement is to a point about 20 miles south of the San Juan mill, or the Old Mission mill location. It carries a freight rate of $1.80. The existing tariffs of the railways from San Juan for 1916 onward to the [200] same point were never higher than 75 cents per ton. Therefore the freight absorption as over San Juan was $1.05, and the net profit before depletion and depreciation was $1.05 or practically $2.10 for value in place before depreciation and depletion as compared with San Juan. That differential as compared with San Juan is now $2.10 for this stone in place.

The stone used by sugar refineries and smelters is

(Testimony of F. S. Richards.)

practically the same class of stone as appears in the coastal deposits at San Juan. They require a close grained stone of high calcium content. It is the same stone that you make cement from.

It is true that there are other grades of stone used for cement; however, the same grade of stone appears, and the stone from the various series of deposits around Santa Cruz, and along the edge of the Old Mission deposit worked by private parties, have been supplied to sugar companies, and the Old Mission Company always refrained from the sale of stone, because it felt that the return per ton was higher from cement than it was from the limestone project. I might say there are no commercial stone producers on the Pacific Coast of any size who are using limestone for the production of concrete segregates or crushed stone, as we ordinarily know it; just the reverse situation that we have in the [201] eastern section of the country.

None of this limestone is used on the roads because of the cost as compared with other material. In the eastern two-thirds of the United States, limestone is a standard commercial article; at Cape Girardo I put in a crushing plant of 12,000 tons in 24 hours, crushed limestone. That is, more than 10,000 tons of that capacity was marked for roads and concrete construction. The limestone in California would make just as good road material as the limestone in other parts of the country but it is too valuable. There is no deposit located for commercial crushing propositions to any extent. I have

(Testimony of F. S. Richards.)

made a study of the production costs of cement with a bearing on the March 1st, 1913, value, or the cost about that time, in this way—that I have reviewed the actual costs of operations and revenue received by the Old Mission Company, or I might say of the total revenue derived through the period of operation on these deposits in question. I had an accounting firm, who have always done the accounting work for the company, prepare a statement of the net revenue of the company, and used that as a basis for determination of the value, discounting it to arrive at the value as of the beginning of operations.

Actual operations at the Old Mission plant commenced in 1918 and continued steadily thereafter [202] until these deposits were depleted and then began working on other deposits.

I have made a study of the conditions in California between 1913 and 1918, not only from an examination of the operating records and the projecting records, as we depicted them for you in the chart before, but an examination of some of the operating records of some of the corporations operating during that period; the history of that period of time would indicate that any value arrived at as of 1918 would be fully warranted and would undoubtedly reflect conditions at 1913 directly. In other words, the value of deposits fixed in 1913 must gradually increase and the value of deposits in that entire section must gradually increase until

(Testimony of F. S. Richards.)

they are entirely depleted, due to the fact that there is no competition to come in and reach them without assuming the high differential necessary to come in from the Sierra foothills.

The increase in cost compared with the increase in market during that period almost in direct ratio, the increase in sales price prior to 1913, the price was $1.50, the figures during the period of operation of the San Juan mill, as reflected by the company, I cannot say what the actual average was during the later years; it was about $1.975. The average for [203] the State returned for the period 1918 to 1927 was $1.99 per barrel.

The average, the net return, the spread between cost of production and the return as of 1918 were about the same as in 1913. It may have been increased slightly during those years. As a rule we would anticipate as the cost of production went up that the actual cents per barrel would slightly increase. It is my opinion that the value of a limestone deposit in 1918 would be substantially the same value that would have existed in 1913 in this individual district. I should say any valuation fixed as of 1919 or 1918 would not stand discounting; in fact, it should be a higher figure than any value fixed in 1913, on account of the fact that there have been two completed plants eliminated in the meantime and a third practically ready to withdraw from the field.

I am familiar with the operations and operating history of the Old Mission Company and when I

(Testimony of F. S. Richards.)

say Old Mission I mean what we have referred to here as the San Juan quite often. I have made a determination as to the value based upon these operations. I took the figures supplied at my request by Haskins & Sells Company, auditor, and made a computation. This is the computation that I refer to (Petitioner's Exhibit 12).

This is an operation record of the cement production from the Barbee, Underwood and Flint deposit, [204] by the Old Mission plant; the total tonnage removed, 1918 to 1928, inclusive, was 1,700,000 tons. The revenue derived by the company before depletion and depreciation as given by years from 1918 to 1928, totalling $3,751,959.42. If we discount that figure under Hoskold's formula for eleven years, the factor being .589748, we have a discount value of $2,191,479.62. I have deducted from that under the formula one-half of the actual plant cost, plus the improvements made during that period; the plant has been depreciated,—I might say, as a matter of comment, that the plant has been depreciated at a steady scale under what I believe is common practice, and that the plant is now in operation on other properties; the actual period of operation shown in these figures includes 1927 and 1928. These two years do not include full operation of the plant, therefore the actual operating period is slightly less than eleven years, although I have used eleven years as the discount factor,—the last year's shipment of sales being practically entirely, or very largely from stock materials carried over as the

(Testimony of F. S. Richards.)

plant was practically cleared of stocks prior to the commencement of operations on other properties. Therefore if we deduct only one-half of the plant cost and improvements which is approximately the figure used by the company, we have a residual value of $1,516,419.83, or, divided by the tonnage available from these properties, a value per ton of 89.2 cents. [205]

I believe that it is a customary way of arriving at the value of properties over many different sources; from an engineering standpoint I have used that method of determination of value of properties for a good many years, especially in connection with the mining industry. I believe it is the common practice for the internal revenue bureau to utilize a similar method, and in fact the table actually used in this case I believe is one that originated in the department itself. I have personally found it to be much more convenient than the English tables which I had used for many years, and I believe it is more accurate and more fair than the interpolation of tables where we had to use two or three or four tables in order to arrive at definite figures or arrive at the same determination, or nearly the same determination that we can arrive at by using the one table as now in use by the department.

I think the figure of 89.2 cents per ton is a fair value for this deposit of limestone as of 1918. I believe that it is a low value as compared with

(Testimony of F. S. Richards.)

existing conditions as we know them at the present time. I would not make any change in the value back to March 1, 1913, and I would not make any allowance because of the fact that the property was not operated from 1913 to 1918. [206] I would say that any failure to operate during that period was a question purely of finance, and the bare possibility, in my own mind, I might say frankly an advantage from a business management standpoint not to have plunged in until they were prepared to go ahead, until they had the proper management staff and technical staff available. I might say this of the cement operations of the Pacific Coast, and practically so of the entire United States, that where proper management has been available and proper technical staffs have been available, there have been practically no delays or failures in operation.

There were a few mills in the hands of receivers in the few years prior to March 1st, 1913, in this country. They were almost entirely older mills along the Atlantic coast, and some older mills throughout the central part of the United States. There were no operating properties out in California in the hands of receivers at that time.

The Old Mission Portland Cement Company as it exists today purchased these properties at a sheriff's sale and the bondholders committee representing about $1,300,000.00 of bonds of the original company, purchased them at that sale. They paid

(Testimony of F. S. Richards.)

over and above the rights of the bonds, they paid $20,700.00. That was in 1912, [207] but I cannot give you offhand the exact date. The fact that these deposits sold for $20,000.00 at sheriff's sale in 1912 has no effect whatever upon their March 1st, 1913, fair market value in my opinion.

If I might express the meaning of fair market value in my own language, it is that figure arrived at by a buyer and seller who both know the article, they know the market, they know the existing conditions about the sale and neither under compulsion.

I was thoroughly familiar with those limestone deposits of the Old Mission before they were exhausted, in the state that I found them when I went out there. I immediately made an investigation of them. I did the survey work and the engineering work preliminary to the future work that was done by the company.

I made reference to a company that had to refund the moneys paid into it to its subscribers. We have in California a Corporation Commission Act, establishing a Corporation Commission and a Corporation Commissioner whose sole duty it is to protect the investor, and it is necessary before stock may be sold by any prospective corporation that they can make a proper showing before the Corporation Commissioner of real value, and in this individual case I do not know what happened before the Corporation Commissioner, but I do know that

(Testimony of F. S. Richards.)

after more than two years of effort to sell stock they were [208] finally called in and asked to refund the money.

I know of an investigation of the Old Mission properties made by the Corporation Commissioner before the bond issue was permitted to be issued by him. The capital stock or the stock structure was not changed in any way prior to commencement of operations. That investigation was made for the purpose of passing upon the validity of the bond issue and the committee was permitted to float the bonds. My recollection is that the amount of the bonds was $350,000.00. That was a small amount as compared with the value of the properties.

The sheet which the witness last identified and about which he testified was thereupon received in evidence as Petitioner's Exhibit No. 12.

Personally I could not say positively, but I believe that so far as population was concerned, I believe Los Angeles had less population in 1909 by a considerable percentage than San Francisco Bay District. I am not speaking of San Francisco alone, but of the territory immediately surrounding the Bay and occupying, we will say, the same square mile territory that is occupied by Los Angeles. I think San Francisco was somewhat greater in population at that time. The location of the two plants, Riverside about 63 od 64 miles from the center of the Los Angeles population and San Juan about [209] *about* 90 miles from the center of San

(Testimony of F. S. Richards.)

Francisco Bay District, but both on a similar freight rate to those centers—I might give you the reason for that freight rate. The Old Mission mill and the Santa Cruz mill both lie close enough to tidewater, both had a possibility at least of rail shipments to tidewater and then moving by water, but they were able to command from the railways a depressed rate comparable with the rate applicable in the other parts of the State as the lowest rate then extant, and they have received and always operated under those rate conditions, so that the rate between population centers, so far as cement is concerned, has been the same. There was one small mill operating in 1909 in the South, and there were two small mills operating in the North; the combined capacity of the two mills in the North operating at that time was about the same as the mill in the South, and about 1909 Santa Cruz mill was getting ready for production in the North, and the Riverside Mill was getting ready for production in the South, so that the mills North undoubtedly had a little the best of the market condition in 1909, and they had much more if we consider the conditions that existed physically in the North of having to rebuild a city of half a million population from the ground up. [210]

I am familiar with the cost of production of cement on or about March 1st, 1913. Our cost of production just prior to that period with midwestern mills was averaging about 60¢ per barrel for

(Testimony of F. S. Richards.)

production cost. My figures come from Michigan mills which I am perfectly familiar with, and Canadian mills. I have investigated costs of production on the Pacific Coast as of that time and I found that there were several operations—I say, several operations, at least two or more which operated at about that time at very close figures compared with the eastern figures—not more than two or three cents variation. That cost of production was about 62¢; that is the bulk cement price or cost of cement in the bins; in a few cases we might even include the cost of cement on board cars. There would be a difference of about five cents between the two. That would ordinarily be termed a packing charge. That was a standard charge at that time recognized by all cement men who knew costs and by engineers.

With respect to the general conditions today on the Pacific Coast in respect of the cement industry, I will try and be very brief, but I am pleased to be able to sketch for you very briefly that situation. In the South half of the State the program of construction work includes Boulder Canyon Dam, the largest block of concrete that has ever been poured, involving about five and a half million barrels of cement going into a single [211] block of concrete; that amount of cement is about one-half of the amount of cement to be used by the reclamation department under that appropriation, the balance going into the canals in the southern part of Im-

(Testimony of F. S. Richards.)

perial County, or Imperial Valley, in bringing the All-American Canal into the valley and building the connecting channels throughout the southern part; that phase of the work which involves as much concrete as the dam itself, little has been said about. Coincident with the building of that a water district has been formed in Los Angeles, estimate work has been completed, the engineer's plans have been accepted and the referendum will be called within the next few weeks, carrying on appropriation of $200,000,000 for bringing Colorado River water from Parker into the City of Los Angeles and the adjacent cities, which make up the water district, so that work alone will involve the use of more than 6,000,000 barrels of cement; in addition to that, of course, there will be a lot of work contingent which will call for some individual users and factories and will make room to buy material for at least 2,000,000 more population in southern California which means prosperity for all of the allied industries in southern California.

The bridge program is probably the largest project in the immediate picture, the building program calls for approximately $400,000,000 to be spent in the [212] next five years in and around San Francisco in permanent projects. The bridging of Golden Gate with a suspension bridge, the bridging of the Bay by the State Highway Department connecting Oakland and San Francisco with a highway and interurban bridge are the two major projects. The

(Testimony of F. S. Richards.)

State itself through its gas tax is spending $40,000,000 a year, increasing every year, and to run for a period yet of ten years under the act now in force. I think that that picture alone of those major projects gives us assurance that the cement industry must be on a sound foundation for many years to come.

These prospective developments that I have just described are a realization of a work that has been done leading up to it. They are founded on the experience and experimental work and actual practice of you might say 24 years following the San Francisco disaster.

I hold Petitioner's Exhibit 2 and can identify it. It is a map which I personally prepared, outline and contour map and marking on it the location of the various properties owned and controlled by cement companies. The Old Mission Portland Cement Company and the location of the Barbee, Underwood and Flint properties. This map locates correctly the properties as they lie; the limestone deposits themselves were very small and do not show, but with one exception, actually, upon this map, and that is in the section or area marked No. 2 in Flint. [213] They show there by two black marks showing the actual location of the workings where limestone was removed. The location of the plant of the Old Mission Cement Company is in the extreme north end of the left hand area marked at the top of the map Barbee with a red arrow indicating it. With a blue pencil I am marking

(Testimony of F. S. Richards.)

the figure 3 there on the map representing the location of that plant. I am making the figure 3 to practically include the plant buildings.

The basis of this map was a contour map prepared, I think, by the State. I would not be positive which map that was taken from but I think it was the State contour map. It may have been a Government map, however, of the United States Government.

On

Cross-Examination

witness testified as follows:

I testified that I first went to California in 1926 for active work. I was in California in 1923 for a few weeks. That was my first visit to California. I went there to work in 1926. The time I spent there in 1923 was during the trip which I described as having made over the United States examining and getting in contact with the cement properties and cement operations of the country. [214]

Not all of the information that I have obtained as to the cement industry in the State of California has been obtained since 1923. I obtained a great deal of information about the cement industry in California long before I ever came to California—before I ever saw it. That was through statistics and various sources of information that are always available to the engineer. The first first-hand information that I obtained was in 1923 and thereafter.

I was in Australia from 1916 to 1923 and spent

(Testimony of F. S. Richards.)

my entire time there except for a trip back to this country in 1919 to purchase machinery for the corporation. I made four trips across the United States during that period.

In 1925 I was employed by a number of corporations in a consulting capacity. Corporations and individuals in Tennessee, New York, Ohio, and Michigan. In 1926 I went to California and was first employed by J. A. McCarthy. He was at that time vice president and general manager of the Old Mission.

I was employed by Mr. McCarthy as a Consulting Engineer for the corporation, as his personal assistant in taking care of the Old Mission matter.

There are lots of materials to make concrete. I think if I interpret your question correctly you mean to say were there any other materials than [215] limestone that can be used to make Portland Cement. My answer is Yes. I know and did see and investigate a large deposit of oyster shells in the San Francisco Bay. I would not say correctly as to the tonnage. I should say 42,000,000 tons would probably be a fair estimate. That deposit was owned by the Morgan Oyster Company and that Company sold those oyster shells for 5 cents a ton to the Pacific Portland Cement Company who owned the Morgan Oyster Company.

I cannot give the exact date when the Pacific Portland Cement Company acquired the stock of the Morgan Oyster Company. However, I can say this. That it acquired control of enough of it that

(Testimony of F. S. Richards.)

it started the erection of its mill prior to 1924. I can not say that it acquired the stock in August, 1920. I do not know.

I have made a thorough investigation of the cement industry out there and I probably have seen the figures showing what was paid but to identify them after several years would not be possible. The figure of $971,150.26 sounds reasonable. It is correct that 42,000,000 tons of oyster shells available at that price would give 2.15 cents per ton.

Within the last few years there have been several operations started on oyster shells and satisfactorily. That, however, is information that was not [216] available in 1916 and not available in 1913. I can say this in association with the industry of plants that actually use shells, for their production, from experience with the Perth plant in West Australia, that until modern conditions, modern machinery and equipment became available after 1916, it was not considered feasible by the cement engineers and cement chemists in the country to manufacture cement from oyster shells. It is now recognized as satisfactory. We have entirely different conditions. We have gone through a revolution or evolution of machinery and equipment, which has permitted us to do things which we could not do in 1913.

I could not say when the Pacific Portland Cement Company acquired the stock of the American Oyster Company (Morgan Oyster Company). I know that it acquired it prior to 1924 but what

(Testimony of F. S. Richards.)

period I do not know. I would like to add to your valuation as taken from those figures one comment, that the quarrying of the oyster shells is done by suction dredge. If we wanted to place a value on those shells we would have to take into consideration the factors that enter into it, those as compared with other things. I have in mind the fact that the average contract for dredging materials, with the most efficient dredging equipment, was about 10 cents [217] per cubic yard, and that to produce a ton of shells it is necessary to dredge several yards of material and to wash it and place it in the barges and tow it into the plant. When we get a ton of shells into the plant it produces, in place of 2.3 barrels of cement only 1.7 barrels of cement. I have not prepared any statistics as to the cost of taking out the oyster shells. I have given the factors, however, that enter into that cost. It all depends on circumstances, whether it is cheaper to dredge than it is to mine rock.

This deposit of oyster shells was in San Francisco Bay adjacent to San Francisco. I would take that into consideration in determining the value very materially. The shells in San Francisco Bay occupied an area in the lower lobe of the bay; if you have with you, attached to your file something showing the location of those shells, you will probably find that they practically all lie within the boundary of the properties held or controlled by

(Testimony of F. S. Richards.)

the Pacific Portland Cement Company; that any shells which lie outside of that boundary come under a State act which does not permit their dredging for any purpose; therefore the question of valuation of those shells is one which involves factors which are not comparable with any other deposits that might be in the district; there can be no competitive [218] value placed on them by other shells in the same location.

I testified that I am familiar with the operations of the Old Mission Portland Cement Company from its beginning from information that I have obtained. It is correct that the Old Mission acquired its property at a sheriff's sale, from the same persons who formed a committee, I believe, for purchasing it.

There was a company known as the San Juan Portland Cement Company in existence prior to 1912 but it did not own all of the property that the petitioner here owned at that time. In 1912, at the time they were foreclosed upon by the bondholders, and the sheriff's sale took place, it owned these three properties which have been and which are here in question. It owned the Chittenden Ranch and through stock ownership the San Juan, Pacific and California Central Railway Company. The San Juan Portland Cement Company owned the properties that are now in question and which are owned by the taxpayer, the Old Mission Portland Cement Company. It also owned the properties

(Testimony of F. S. Richards.)

of a railroad that was the connecting link between the plant and the Southern Pacific Railway at Chittenden Junction. The total trackage of that railroad at that time was about 9 miles, about 7 miles of haul.

About $1,300,000.00 had been expended by the San Juan Portland Cement Company up to that time. Their bonds at issue were approximately that amount. [219] What the expenditure was I could not tell. There may have been money spent beyond the bond issue. I do not know what the bonds may have been sold for. I never investigated their records. When I refer to $1,300,000.00 I mean that they had a bonded indebtedness of that amount at that time and that indebtedness was represented by the man who bid in the property. Part of that money may have been spent on development of this railroad or acquiring right of way. At the time of the sheriff's sale all of the property was bought in by a bondholders' committee. That included the Chittenden ranch, the Barbee tract, the Flint, and the Underwood property and also the machinery that was on the plant at that time. It also included the stock and bonds of this railroad company that I have just mentioned. The Old Mission Portland Cement Company acquired this property barring a few bonds and stock shares which were out of the railway company and I believe there were a few bonds, very few, only one or two of the original San Juan Company. In other words, of the properties owned by the bondholders' committee, which

(Testimony of F. S. Richards.)

had been purchased at a sheriff's sale in 1912, the Old Mission Portland Cement Company acquired the plant site, the Chittenden Ranch of about 1,010 acres, the plant site being figured at about 160 acres, the [221] Underwood limestone deposits considered about 85 acres, the Barbee limestone deposit of 696 acres, and the Flint limestone deposit of about 512 acres. In other words, about 2,463 acres was acquired by petitioner, the Old Mission Portland Cement Company, and in consideration of this property of 2,463 acres, it gave 175,000 shares of its stock, the par value of which was $10.00 a share. That would be $1,750,000.00 par value of stock issued for this property which consisted of the four parcels of real estate I have just mentioned, including the plant.

The plant was not operated until 1918. The first operations began in May of that year and no operation had been possible with the physical condition of the plant prior to that time. The plant was just completed in about May, 1918. Part of the plant had been completed in 1912 when acquired by the Old Mission Portland Cement Company. Some of the machinery was on the ground at that time, but it took until May, 1918, to complete the plant. The history of actual conditions was this: that the people who put the machinery on the ground were not able to complete their undertaking. They lacked the technical experience in the management to go ahead with their product and it simply lay idle until a man came along who was familiar with the

(Testimony of F. S. Richards.)

industry [221] and knew what to do with it. It was very difficult to get somebody to take hold of a property of this size at that time. It is hard at any time to get men who know any industry completely and can go ahead and finance and manage and operate the plant and make properties successful. That is one of the difficult problems we always have to meet.

The fact that they had put $100,000.00 in the company to complete the plant and put it in operation indicates that they made some serious effort to obtain sufficient capital. I believe it was in 1914 that Mr. McCarthy first came in contact with it. In 1916 he actually took possession of it but slightly before that he made the reports for the engineering companies and when they failed to carry out the program he was given the liberty to carry it out himself and he immediately proceeded to do so. I think very little consideration had been given to the property by other companies so far as I know except back in 1906, 1907 and 1908. Possibly as late as 1910 or 1912. I know that the Henshaw interests were always more or less interested in it but were unwilling to proceed with the men who were in the old San Juan organization.

The Underwood and Barbee properties produced somewhere around 250,000 tons—a little over [222] 200,000 tons, rather. The Barbee was adjacent to the plant and produced a very small tonnage—never was satisfactory and never was considered satis-

(Testimony of F. S. Richards.)

factory. It was included in the property tied together and consisted of a moraine deposit of gravel. The Underwood deposit was about a mile and one-half, I think it was about 2 miles from the plant and the Flint deposit was about 3½ miles from the plant. They reached the Flint deposit by a narrow gauge railway which was constructed after 1913. It was constructed as required for operations prior to the operations and extended as required. In other words, the narrow gauge railway to the Flint deposit was constructed after 1918 and the railroad to the Underwood deposit was constructed after 1913 also.

The Old Mission Portland Cement Company acquired practically all of the stock and bonds of the railroad company that we have referred to as being in possession or ownership of the bondholders' committee in 1912 at the time of the purchase. It acquired what was outstanding. It did not acquire them at the original sheriff's sale. They were acquired from time to time as they could be picked up. They were acquired later by the Old Mission Portland Cement Company. There was only a small quantity acquired in 1917 or 1918 so far as my recollection goes and that consisted of the stocks and bonds of that railroad company. [223]

The Old Mission Portland Cement Company acquired a controlling interest in the stocks and bonds of the railroad company at the sale. I think the records of the Company will show that and the County records of San Benito, Hollister and

(Testimony of F. S. Richards.)

Suisun. I question very much any record which shows that the entire stock and bonds were acquired in 1916 or 1917 because I am satisfied my investigation of the records was that the original purchase included a major portion. There may have been some acquired but I do not think that the entire amount was acquired. I testified that the property that was acquired for this stock included the railways—the control of those railroad companies. It is my understanding that the bondholders' committee turned over to the Old Mission Portland Cement Company the stock and bonds of the railroad company in 1912. I do not think I have any records to substantiate that. I will be glad to see what I can find out. I am not sure. I have the bondholders' agreement here. I will be glad to make an examination of any record which may be available to me here tonight. I will say frankly I did not anticipate questions along this line or I would have brought records dating back into that period if there are such records available. I will see what we have. [224]

The properties sold at the Sheriff's sale, so far as I can trace them, included the Chittenden Ranch, the Barbee, the Flint, and the Underwood tracts which contained the limestone deposits, the existing plant equipment and the stock of the San Juan Pacific Railway. I believe that some of the bonds of the San Juan Pacific Railway were sold at the same time. That property was owned by the San

(Testimony of F. S. Richards.)

Juan Portland Cement Company. The Old Mission Portland Cement Company was formed shortly thereafter in the fall of 1912, about two months after the Sheriff's sale of the property just mentioned. The Old Mission Portland Cement Company acquired for $1,750,000 par of stock, represented by 175,000 shares of $10.00 par value each, the plant equipment, the plant site, the Chittenden ranch, the Underwood-Barbee and Flint limestone deposits. The plant site was approximately 168 acres and the Chittenden Ranch 1,010 acres. My recollection is that the Underwood limestone deposit was more than 85 acres but that amount may be correct. The Barbee was approximately 696 acres and the Flint deposit 512 acres.

In 1912 a railway company by the name of California Central Railroad Company was formed and the San Juan Pacific Railway Company sold its assets to that Company for its stock and bonds. [225]

I have information about a limestone deposit owned by one E. A. Pearce. I believe it stands in Mr. Pearce's name. The Old Mission Portland Cement Company purchased some limestone rock in place from E. A. Pearce in 1920 at 10¢ per ton; also in 1921. The Old Mission Portland Cement Company obtained a lease from E. A. Pearce in 1927—a 10-year lease—providing for the payment of 10 cents per ton for limestock rock taken from the quarry. That was 10 cents per ton for rock in place. I negotiated that lease myself—that is, the

(Testimony of F. S. Richards.)

lease made in 1927. I believe it runs for a period of 10 years.

For the period 1906 to the date of the sale in 1912 these limestone deposits were owned by the San Juan Portland Cement Company. There were bonds of that Company to the extent of $1,300,000.00 and odd outstanding—the bondholders representing those bonds were the men who bid in the property at the Sheriff's sale. I do not know what those bonds were sold for by the San Juan Portland Cement Company. I doubt whether there would be any record in existence to show that. I made an attempt to determine that fact. I have some information as to what portion of the funds that were derived from those bonds was spent in connection with [226] the development of the rock rather than the construction of the railroad. The machinery and equipment which was on the ground at the time of the Sheriff's sale was valued afterwards. It ran over $500,000.00. I cannot give you the exact figure—besides the building of the railroad and the extension of the railroad up to the limestone deposit. I am speaking of the uncompleted plant.

Referring to petitioner's Exhibit 12, this computation or these figures were supplied at my request by Haskins & Sells, auditors for the Company. The computation made below, the gross figure given, was made by myself. The total profits there of $3,715,-959.42—that information was furnished me by Haskins & Sells. The period from 1918 to 1928,

(Testimony of F. S. Richards.)

inclusive, during which those earnings were supposed to have been made, includes the period through which the 700,000 tons of material was manufactured and turned into cement and my instructions were to cover that actual period so far as the revenue or income of the Company was concerned and only that period. This statement does not show the tons of rock taken out during each of the years. It might have done so. However, my understanding was that the tonnage from the property was an agreed item. Therefore, I gave it in a lump sum at the top of the column.

The Old Mission Portland Cement Company [227] sold all of its assets to the Pacific Portland Cement Company on or about March 1st, 1927, so that the Old Mission Portland Cement Company, the petitioner in this case, was not in existence as far as operation was concerned after March, 1927. By reference to the notation at the end of the sheet (Exhibit 12) it will be seen that I do not infer that. It says there "Operation record of cement production from the Barbee, Underwood, and Flint deposits by the Old Mission plant." The largest income from the plant shown on this sheet was during 1927, the amount being $493,477.60. The explanation of that is that during 1927 and 1928 the plant did not operate at full capacity but realized on the stock of material already manufactured in previous years and the records will show that those stocks were carried at cost of manufacture on

(Testimony of F. S. Richards.)

the books and carried over from the previous year, thus swelling the revenue apparent as profit into the years 1927 and 1928. The same statement applies to the year 1928.

There was no stone moved from other deposits to any extent during 1927 and 1928. I mean, the Old Mission Portland Cement Company had no other limestone deposits that were in operation in 1927 and 1928, other than the three deposits which were taken over. So far as I know no other stone entered into it. The Pearce deposit which you spoke of a moment ago, the [228] matter of the lease, was not opened up for actual plant construction until 1929. The lease was executed back in 1927 and the actual opening up of the deposit was not made until a later date. The lease was not actually obtained by the Old Mission Portland Cement Company from E. A. Pearce. I think the final agreement was executed by the Pacific Portland Cement Company. It may have been assigned. It was right from the period of consolidation and I cannot recall whether that lease actually ran directly to the Pacific Portland Company or whether it was an assigned lease. I personally had the matter in hand for the negotiations and I cannot recall definitely without getting hold of the document whether it ran to the Pacific Portland Cement Company or whether it was one of a large number of papers that were assigned. It was negotiated during the period of operation of the Old Mission Portland

(Testimony of F. S. Richards.)

Cement Company and it ran over the period of 1926. The negotiations ran through 1926 and 1927, and whatever benefits or rights the Old Mission Portland Cement Company had to this lease from E. A. Pearce were transferred to the Pacific Portland Cement Company.

Now referring again to petitioner's Exhibit No. 12, at the bottom of the page, I have used a discount factor of 8 and 4 for 11 years. This is an 8% return over an 11-year period and by reducing the total [229] income to a present worth value I arrive at $2,191,479.62. From this I have taken "less one-half of plant cost and improvements, $675,059.79," leaving a balance of $1,516,419.83. That is the value as I have computed it of the limestone in place. In arriving at this I have deducted from the total value only half of the cost of the plant and improvements.

In its income tax return for some years, the Old Mission Portland Cement Company claimed a depreciation deduction of 7% upon its plant and equipment on a life of 10 years. In some years it also claimed as low as 5%. That was back in the earlier days of production and before the present day knowledge of depreciation and depletion charges was as well standardized as it is today. In later years the Old Mission Company claimed 10% depreciation on its plant and equipment.

If that had been true during the 11-year period, the plant would not have been fully depreciated because depletion at 5% and depletion at 10% did

(Testimony of F. S. Richards.)

not mean that the plant and improvement were going to be wiped out from the depletion standpoint in a matter of a 20 or 10-year period. The accumulation of improvements during that period spread out and left on the books at the end of any life period a sum of money which experience has taught in the cement industry and in other [230] industries meant a severe loss due to the fact that the properties are worked and the depletion rate has not been computed properly for plant equipment in connection with it. I might say that I have in my desk right now several cases where those amounts ran to more than a million dollars.

I do not know off-hand what the plant equipment and investment of the Old Mission Portland Cement Company was in 1920, nor in 1921. It had a complete plant before it could start operations and that plant cost around a million dollars to complete it. There was an accumulation of cost of plant and equipment which at the time of the closing of the sale to the Pacific Company in 1927 did accumulate to twice the figure which I have used for deduction, or $1,350,119.58. That is the total cost of plant and improvements on March 1st, 1927, at the time of the transfer to the Pacific Company. That much plant and equipment had been acquired during that period and includes machinery and equipment that was acquired in 1912 at the date of organization.

I believe the depreciation that had been entered on the books of the Old Mission Portland Cement Company at that time was about $720,000.00 in

(Testimony of F. S. Richards.)

round figures. We might possibly have a statement here to show that figure. I have a figure here of March 31st, 1927, [231] which, without any question, ties into the record of reserve for depreciation of $764,024.91. I am now referring to what is termed a copy of the Revenue Agent's report. On page 68, Exhibit T, of that report the column entitled "Depreciation accumulated on the books at December 31, 1926" is $724,547.57. That appears to be the correct figure and is close to the quotation of $720,000.00 which I made.

Looking at the same Exhibit T, page 68 of the Revenue Agent's report, on the last column of the sheet marked "Year of Exhaustion" it states "No depreciation was taken until 1918. From 1918 to 1921 5% was taken. Subsequent 10%." I believe it is correct that in 1921 the petitioner took 10% depreciation. If the plant and equipment were depreciated at the rate of 10% on the original investment, the original investment might be returned within 10 years, but the plant life is but 10 years and you still have a value left on your books at the end of that time. By the words "the plant life left on your books" I mean there must be improvements made during any life of 10 years in any industry of the class of a cement company. It is impossible to operate 10 years without having some changes made. The same rate of depreciation would be claimed to apply to the improvements; that is, 10%, but you have not a [232] 10-year life

(Testimony of F. S. Richards.)

over which to depreciate them. The plant originally cost approximately $1,000,000.00 and was approximately completed in 1918. However, the valuation of these properties of the plant and equipment in 1913 was $500,000.00. If you take 10% depreciation from 1918 to 1928, you should have a reserve on your books to take care of the total investment of the plant and equipment at 1918, but if your plant was increased—if you made capital expenditures—those expenditures would be added to the capital investment of $1,000,000.00 and depreciation at the rate of 10% would be claimed on that. So that at the end of the 10-year period your original investment in machinery and equipment should be returned—your original investment as of 1918—and the proportion of any improvements that remained in 10 years would depend upon what time they were made.

For the 11-year period I have deducted as cost of plant only $675,059.79. The evidence in the record would show that the plant had not operated at full capacity during the entire time and that the life of the property in question was about 10 years; that there was other property owned by the Old Mission Portland Cement Company in 1913 on which there were limestone deposits and over which the life of the plant must extend. Therefore, in fairness to all concerned [233] as an engineer I must place some value on the residual plant life at the end of that period of 10 years—actual plant capacity utilized during 11 years time—and I have

(Testimony of F. S. Richards.)

done so and deducted it from the earnings coming from the portion of the property, leaving the balance of the plant to be set against the property yet to be operated and on which the Company is operating at the present time.

The rate of 10% flat over the entire plant is a reasonable rate of depreciation in most cases. In some cases it would be too high; in others it would be too low. I think the amount claimed by the Old Mission Company in 1921 of 10% was reasonable. I would not say it was more than that. If I might say so, for your information, the cement industry has gone through, from the time of the purchase of this machinery, up to the present time, a period of 19 years, a remarkable change in the character of machinery in use, and it has forced companies to write off their plants at a greater rate of depreciation, even, than that agreed upon by the Cement Association and the Internal Revenue Bureau. They may not appear in the records, but it is an actual fact, that it was necessary for them to write their plants down on account of the revolutionary changes that have taken place in the industry. [234]

I have stated that at the time the taxpayer acquired this property in 1912 the plant and equipment had cost around $500,000.00 up to that time. I believe that figure was agreed upon by the Bureau of Internal Revenue and the Company's officers and it has been used as the investment in machinery and equipment in 1912 and that is the same ma-

(Testimony of F. S. Richards.)

chinery that was used in 1918 with additions costing approximately as much more, making a round figure of one million dollars. Some of this machinery that was used in 1918 had been on the plant site prior to 1912 and some of it had been there in 1908. My recollection is that the figure agreed upon was the figure placed upon the plant and equipment by E. A. Leh, a cement engineer, who made the valuation. I do not remember that this is the same amount that was shown on the books and records as the value or cost to the San Juan Portland Cement Company. My recollection is that I have never seen any record of the San Juan Portland Cement Company which set up those figures, but I have seen a memorandum which was exchanged covering Mr. Leh's valuation. Mr. Leh was a man who was a cement engineer in charge of operation of plants to my knowledge, in Michigan, Montana, and California, and I believe he is still living some place in the Bay District. I saw him [235] within the last two years. I could not say that a substantial portion of the machinery and equipment becomes obsolete in a few years after acquisition as far as the San Juan mill was concerned. San Juan mill was one of a very few which came between the period of what might be termed the original type of mill in this country and our present day mills. San Juan, the Riverside mill, and one or two mills in the Lehigh district were equipped by the Bonnett Company of Canton, Ohio.

(Testimony of F. S. Richards.)

Those mills were built up with units, grinding units, which were loads with steel balls or grinding units or mediums. They were run at speeds, the preliminary mills were run at speeds which were comparable with the speed of the finish mills, which was a reversal of conditions. They were larger diameter mills than the earlier mills, and had greater grinding capacity. These mills were run as individual units. Later on, in 1913, or 1912, the Europeans put the two mills together, coupled together as a unit, and called them a combined mill, or combined mill or comped mill, and those mills then were divided into sections, as a preliminary grinder, an intermediate grinder and a finish grinder, by just putting a partition at the mills, a discharge place. The mills were larger than the older type mills, and they have developed into mills of very large size at the present time—a development [236] really that came following this type of mills on which the San Juan was built. The result was that the actual depreciation due to obsolescence of the San Juan mill was not rapid as those that had been built, as many other temporary mills were built at the time the San Juan mill was equipped or machinery bought. It is doubtful whether I can say that the San Juan equipment is even obsolete within the next ten years, due to the fact that it is so close to the modern equipment that it should be worn out. The question has been discussed many times, and we have never been able to develop any figures that would warrant taking out that machinery and replacing it with modern machinery. We will admit

(Testimony of F. S. Richards.)

that the cost is probably slightly higher than it would be if we had the modern machinery in its place, but not enough to warrant its replacement at the present time.

I believe the Old Mission Portland Cement Company was justified in charging a rate of 10% depreciation on its plant and equipment in view of the fact that in the earlier period of four or more years it had only charged a rate of 5%. It was not operating at full speed at that time. However, the machinery was bought back in—actual construction began, so far as the present owners are concerned, back in [237] about 1915 and had been on the ground for practically three years before operations began, which brings another factor into depreciation. I expect that at least 50 per cent of the machinery and equipment was in existence in 1912.

Referring to Exhibit 12, I have made the computation as being the value of the limestone rock in the Barbee, Underwood, and Flint deposits, and have a figure there of $1,516,419.83. I have arrived at that figure by taking the earnings over an eleven year period and have used a return of eight per cent.

Thereupon the following question and answer took place:

> "Q. Mr. Adams, Counsel for respondent). Have you ever known any person or corporation to make an investment in limestone rock on the value as computed by you on Exhibit 12, with a rate of eight per cent in return?

(Testimony of F. S. Richards.)

A. Yes; I think I could turn in my files to a number of cases where investments of a similar type have been made."

Thereupon the witness testified further on cross-examination as follows:

I do not know of any limestone property in the United States, suitable for manufacturing cement, that was purchased on the basis of a computation by Hoskold's formula discounting the expected profit to be derived from the sale of cement as a manufactured article. That is, it has not personally come to my knowledge. I believe this is the first case to be heard in which the Board should apply the common [238] practice of establishing the value on limestone; at least, there has been the opportunity to utilize it, and also to utilize the formula and method that is utilized by the department in the determination of values of other properties. If I may explain the use of the formula, I might say that I was associated with a group of engineers, who cover world wide operations, mining operations, and that the English tables, used and applied practically as you use them in the Department, have been applied for 20 years or more in this industry. We were not using them in this country to any extent, with the exception of the work that has been done through the Department. In the mining industry, they are used between mines and in the valuation of mining properties. So far as I know, they have not been applied to any extent to the

(Testimony of F. S. Richards.)

cement industry. As I explained in my earlier evidence, limestone is so plentiful in the eastern part of the United States that it is a question of whether such a method of valuation can be used. In the West, however, we have an entirely different situation. Dealing with an ore body situation, practically a mining proposition, we must know approximately where we are coming out when we build a plant, the same as we would if we were building a mining plant. I have under consideration at the present a proposition involving [239] several properties, in which the actual valuation for consolidation and use of those properties is being established on the basis of the use of this very formula as I have used it here, and practically by agreement of all the parties concerned.

All factors are taken into consideration in application of a formula. There is a wide range from which to choose. In the Department's own schedules the rates run from twelve to four per cent. In practice seldom are these extreme limits used, except possibly maybe used in some extra hazardous or some less known industry. In this case, we are offering our basis on one of the greatest stable industries of the nation, an industry that is only superseded by very, very few industries of the entire country.

It may be true that most limestone properties are bought on the acreage basis rather than on the ton basis—I would say it was true of most of the deposits of limestones lying east of the Rocky Mountains. In California if they are bought on an acreage basis

(Testimony of F. S. Richards.)

they are bought on some definite knowledge of the content of the acreage, unless the buyers are unfamiliar with what they are buying, or the sellers are unfamiliar with what they are selling.

In 1912 the petitioner also acquired [240] the right to extract limestone rock from a deposit known as the Gabilan deposit. It paid $500,000 for the mineral rights on that property, without making any prospecting study of the property other than a superficial survey of the surface. It issued $500,000 par value of stock, rather than cash. That was in 1912. I will be pleased to furnish you a copy of one of those stock certificates for examination, as it stands today. That is still valuable property and still has a value. This individual certificate has a value still today of about somewhere around a thousand dollars. The property has been drilled over a part of it, and quarry operations at the present time are moving some of the materials from that property, and some from the Pearce which adjoins it. The actual limestone areas which are involved in that property probably cover in the neighborhood of six or seven hundred acres. How much of that is available for limestone I am not prepared to say. The prospect work only covered a small acreage—that is, up to the present time. I might say that the estimates at that time, 1912, and that the estimates that cement engineers made also showed that little individual deposit had worked out a little better than 200,000 tons, a fabulous figure of tonnage. The figure ran all the way from 200,000 tons to several million tons.

(Testimony of F. S. Richards.)

I will say this, [241] that on the entire West coast limestone deposits, no figure is worth the paper it is written on until it is backed by definite prospect work, and I refuse positively to accept any figure on any property in California, or on the West coast, until I have seen it surveyed under engineering conditions, the same as you would survey any ore body in mining properties.

The lay of the rock in California is entirely different from that in the East. The difference is that in the West the original base of the limestone deposit, that is, the original strata, have been so disrupted by changing physical conditions of the country, probably better described as the strata through which the granite rocks have arisen and broken the limestone until it has fallen over the underlying strata, and then fallen into pockets, or slid into pockets. The major portion, probably, 999 parts in 1,000—maybe only part in a million is left of those original strata. The deposits left now are those that tumbled in or folded in sections of these original strata. At one time there is no question but what the Pacific Coast was blanketed with limestone practically its entire length, but today there is probably only one acre in a million on which limestone can be found.

In my opinion it is very difficult in [242] California to determine the actual amount available in any deposit. It can only be determined by prospecting and drilling. That is not true in the East. In the East you can determine in most cases by what

(Testimony of F. S. Richards.)

you find in two molds running through the property, or you can see it for miles around the outcrop, and you can pick it up, and any test drillings in between will show those stratas running continuously. There are a few places where it is folded and broken in the East, and the map which we have in evidence here shows large areas throughout. It is almost one continuous blanket of stone. I could describe to you thousands of miles of territory wherein I am satisfied that you could build a cement plant on every quarter section and have an ample supply to run for the life of two or three plants on that quarter section.

When they began to take out the rock on the Underwood deposit the rock ran from ten to probably forty or fifty feet in thickness and only a small blanket lying on the face of the hill. Underneath was granite, only where the limestone had slid down the side of the slope and there was a loose deposit on the face of it.

The Underwood deposit was practically depleted in 1919. A record residue was worked out there and then the Pearce deposit was a small pocket, and several [243] other small deposits were worked for a supply while the narrow gauge railway was being pushed up the Flint deposit. The narrow gauge railway from the Underwood was about two miles actual track. The extension of the track was about two miles. The trackage from the Underwood to the plant was a little better than two miles. The total

(Testimony of F. S. Richards.)

trackage was a little over four miles from the plant; in an air line much less than that, but the narrow gauge railroad was over four miles from the Flint deposit to the plant.

The Flint deposit was a case of where the limestone apparently had come in from both sides of the slope and had gathered together in a narrow crevice, and it lay directly across what is now the ridge or hill, and under the erosion that had taken place in later years it had formed two gulleys, just like the blade of an axe, stuck in the hill. The limestone lay in that wedge, with the granite backing it on both sides. I can give you some photographs showing the existing conditions of those deposits. These photographs were taken by myself in October of this year, and show the conditions as they existed, with the workings, with the limestone worked out. These notations on them are my own (producing photographs). Here is the upper Underwood (indicating). That is the lower Underwood. It is the lower edge of the [244] property. For plant designation they call it the lower edge. This second picture that I have handed you is the Upper Underwood, the southern section of the fact of the property.

It was not necessarily very difficult to determine the tonnage in these deposits without actual operations—without actually carefully prospecting the property by drilling and tunneling which is usually done with this type of deposits, whether it is limestone or another type. The condition is entirely differ-

(Testimony of F. S. Richards.)

ent in the East and that is true of the middle West. I do not say that it is advisable not to, by any means. I say that no investment anywhere could be made until the entire body of material is prospected, any more than a stock of goods should be attempted to be sold by the looks of what may be on the shelves. They should know by direct inventory what is there. I have given you those three properties, and on the question of the source of supply of limestone, I have brought in the question of the Pearce quarry, which supplied a part of the stone in 1920.

On

Redirect Examination

Witness Richards testified as follows:

The first use of oyster shells for cement purposes in a commercial way occurred at Houston, Texas, and in Perth, Australia, about simultaneously during 1919 [245] and 1920. The mill at Perth, Australia, was under my supervision.

I think in the early evidence I stated that the shells were difficult to handle and were not suited for cement materials, and it was so recognized by practically all of the cement mills before the advent of the modern heavy grinding machinery. I can recall an incident in the days when we were using marl in the Michigan mills. As we would get a carload or a barge load of marl, which was filled with shells, the common feeling among the boys in the laboratory and the mill was that they could not be ground fine enough in the mills that we had. A shell is like a

(Testimony of F. S. Richards.)

book. You try to hammer a book up with a hammer. It doesn't hammer up like a stone. It sticks tenaciously together, and the same thing is true of shells. Until we got powerful enough machinery to grind those into fine flour, we could not grind them with our early machinery, prior to 1916, which was the beginning of the heavier machinery. We were not able to grind these materials fine enough for satisfactory use. It is necessary that the raw materials for cement be ground, from a point that rapid fusion will set in, at about 2,200 degrees. The chemical reaction that takes place in the kiln will then run on up to about 1,200 degrees Fahrenheit or [246] hotter than a steel furnace. That chemical reaction will not take place if the material is not ground fine enough, and the result would be an inferior grade of cement clinker, which will not make satisfactory cement. It would not be sound; it will not pass the Government specifications. If put in a tube, it is in danger of blowing the top off, as happened in the early days, when they would try to grind cement in cylindrical cells, particularly when the cement was not well combined.

With respect to the cost of handling shells in the San Francisco Bay District, I will say that in the first instance the building of a cement plant in the Bay district entailed the building of a plant in thickly populated territory. The only available location for that plant on the properties of the Morgan Oyster Company, or adjacent to them, and the point

(Testimony of F. S. Richards.)

selected, was about five and one-half miles from Stanford University, President Hoover's home, about three miles from Allerton, two miles from Redwood City, all high-class residential areas. The foundation conditions at that location called for the driving of piling, none of which was less than 90 feet in length, to support ponderous machinery and enormous weights of storage tanks, stored clinkers and stored cement; so that the cost of the development of the plant site, so far as that individual alone was concerned, without the figures in front of me, [247] was roughly one million dollars, compared with no cost of preparation for a location like the Old Mission location.

In addition to that, this location involved the addition to the plant of dust collecting equipment, to clear the dust discharged from the kilns, which was a large amount, running anywhere from five and one-half to thirteen or fourteen percent of the actual material for a given kiln, and at the time of the building of that plant, that type of equipment was very scarce. The plant was started without it, and created a nuisance, and had to be practically shut down for several months.

The Western Precipitation Company of Los Angeles developed rapidly an emergency electrolytic dust collecting equipment and installed it, which was partially satisfactory.

With the improvement of the plant, additional equipment was added, and today about 99 percent of that dust, or more than 99 percent is collected, but

(Testimony of F. S. Richards.)

the cost in that individual case, when the work is completed, that is on hand now, will stand on the books of the company at about $750,000. So we have an excessive cost for plant location in order to operate on the shells. We have an excessive cost for property. [248]

When we come to handling the shells themselves they have to be dredged from beds of shells that run from a few inches in thickness up to, in a few cases, as much as 20 feet. My recollection is that the average is about three feet. It may be a little more, it may be a little less.

Let me put it this way: It is necessary to dredge all of the shells that cover an area of approximately 100 acres to secure material for one million barrels of cement. Now, that involves the movement of a great many yards of material to take those shells out and wash them out of the mud. For instance, in a place the dredge is working ten or twelve feet in depth and not more than two or three feet in thickness, there was a washing, and they were carried into the plant and rewashed with fresh water, all entailing a large body of equipment and more or less expensive operation. The average distance from the deposits will be about five and one-half miles from the time the barge is loaded until it is landed along side the plant. So that transportation conditions by barge, and naturally in an open basin the size of San Francisco Bay, is really more or less a problem. There are times when it is almost impossible to tow barges in the Bay.

(Testimony of F. S. Richards.)

I should say that the development of this [249] shell deposit in the Bay does not threaten the limestone cement industry of the State. I think the production records and the conditions existing indicate that the incoming of this plant by the Pacific—I might say it was only a 2500 barrel plant when it was brought in to replace the Suisun Cement plant, which was a 4,000 barrel plant, and there was an actual reduction in the capacity in the district at that time, but that plant has been rebuilt to a larger capacity to meet the normal growth.

I did not consider the railroad situation in making any valuation figures. The situation was this: that the railroad was and is a common carrier, and the fact that it might not be a subsidiary of the company and receive a profit on the freight was not taken into consideration. This means the line running from the plant to the mainland that is commonly referred to and known as the California Central Railroad. All freight rates are fixed jointly. It is essential that they are fixed by the State Commission for freight traffic inside the State and for traffic outside of the State they are established by the Interstate Commerce Commission. Only where you are dealing with the profit as a joint return would the actual freight paid be reflected in these profits. I would have to go into that detail with an auditor to make certain that those figures were actual joint returns, [250] in order to see that the figure was reflected by them. Those prices are based on

(Testimony of F. S. Richards.)

the mill net. In fact, no cement is billed any other way practically. Even though the price may be made f. o. b. consumer's point, the consumer pays the freight and deducts it from the invoice. The mills keep their records as a mill net figure; that is, the price received on board cars at the mill. So that whether or not the railroad was owned by the Old Mission Portland Cement Company would make no difference whatever in the valuation figure. Throughout the entire operation of the plant, whether the records would show that the railroad was owned or not, it was controlled and operated and managed by the officers of the Old Mission Portland Cement Company, or men working under their direction.

My recollection is that the bondholders of the San Juan Cement Company were all the same people that held the stock of that company or approximately the same. They were limited to a very few men, whose interests were closely allied. My recollection is that this figure of $20,000 that was paid at the sheriff's sale was practically the sheriff's cost of handling the property during the period. At that time there was considerable machinery on the ground that had to be valued. There was more than a half million dollars' worth of equipment there. [251]

So far as I know, the equipment laying there was largely mills and kilns, which were of heavy metal plate, three-fourths of an inch in thickness or more, and the exact deterioration, so far as physical deterioration is concerned, would be very light so long as

(Testimony of F. S. Richards.)

they were not in actual use and contact as grinders or crushers.

In connection with the one-half of the cost of plant and improvements which I deducted in this computation (Petitioner's Exhibit 12), when asked by counsel to state what the depreciation reserve was I referred to a document which was handed to me and which was admitted to be the Revenue Agent's report. The depreciation reserve shown there is in excess of the depreciation reserve which I stated that I considered or used. I believe the difference lies in the adjustment between the figures. The figure that I used was Haskins & Sells audit figure which was used in the tax return. The figure used in the return I believe is the one which has been accepted by the Bureau of Internal Revenue rather than the one in the agent's report.

In speaking of so many acres on the various tracts acquired in the original acquisition of property by the Old Mission Portland Cement Company I meant by "acres" that that was the area of the tracts [252] of land on which these deposits lie. I did not mean that there were that many acres of limestone. The acreage and the limestone content have no connection practically except that the limestone lies in each area, lying within those areas.

With respect to the acquisition of some limestone from a person named Pearce, I will say that the period between the time when the Underwood deposit was nearing its depletion and the Flint deposit could

(Testimony of F. S. Richards.)

be opened up, the company went out and picked up with motor trucks several small deposits of limestone that first wore off of the deposits of limestone, in all of this area on the Pearce property located about one-third of a mile—well, just about a mile above the upper edge of the Underwood property, and one-third of a mile from where the narrow gauge track turned up a side hill to reach the Flint deposit. Only a few thousand tons of stone came off that property during that period of time, a very small proportion compared even with the 1,700,000 tons that is involved in this case. The company paid a royalty, as stated, of ten cents a ton.

A perusal of the operating records of the company will show that the stone gathered from those small deposits during that period cost the company 88 cents a ton more than it cost them after they had [253] reached the Flint deposit, and about the same figure more than it was costing them to operate from the Underwood deposit. Therefore, if we were to utilize that figure for valuation, we would have to utilize the excess cost of reaching these deposits, building surface tramways and bunkers, the excessive cost of digging the stone out of the ground, rather than working against quarry faces. That would establish a pretty fair value of the limestone in place, where there was a workable quantity.

Later on, as I said, I negotiated, throughout 1926 and 1927, the lease that is now in existence in the hands of the Pacific Company for a further amount

(Testimony of F. S. Richards.)

of stone, which lays in that property, owned by Pearce and his associates.

Location on this map (Exhibit 2) of the Pearce property was marked on this as one of the emergency areas. I will put a red circle around it. That was the 1919-1920 operation on the Pearce property.

The witness then placed a figure 4 in red pencil on the map to further identify the Pearce property and continuing, testified:

Now, the second or later agreement which I said I negotiated with them, covers a point or a dome of disintegrated granite ore, which is a scattered and loose deposit of limestone, which, again, I might say [254] the geologists and myself seriously disagreed over. Dr. Oschner, the man who was probably responsible for the Kettleman Hills oil field location, claimed that what we found there, as a wedge sticking in the ground, must exist all over this deposit. I said "No; you must prove it first." Then we drove a tunnel through; we drove several more, and we found that it was just a skin of limestone, just a dome over the top of a hill. There is no solid strata, no identification of it, and the depth of the material runs from one-half—well, we might say from nothing, but even where it appeared, it ran from one foot to probably thirty feet. I have a few photographs to show you of that situation.

But let me tell you the story of that exhibit.

In 1926, one of the first problems, as I said in the evidence, was that I had to study the actual situation that the company faced. I found that they had

(Testimony of F. S. Richards.)

partially completed the prospect work of the Bryan oil on the Gabilan Ranch, and had made up their minds that they would go to that location for stone. In the meantime, this map shows three pieces of property, 34, 35 and 36 numbered on the map, which it appears that his associates had either purchased or believed they had [255] purchased an option on, and were paying large sums of money for in monthly installments, and they were blocking the way to the company to its deposits, which it had held for years on the Gabilan property.

I investigated the records, and found that there were other pieces of property available, purchased them, and ran my survey around their property, which was for aerial tramway transportation, rather than rail transportation, and as we had to cross Pearce's property to get there by rail, we were literally up against a hold-up. They demanded that we take whatever limestone there was on their property, first paying them a royalty of not less than 25 cents a ton and paying excessive preliminary costs, in order to reach their property, and I found it advisable, from an economic standpoint, to carry out the construction of the aerial tramway and its survey.

When they found that we were going to reach the property and get our limestone without touching any of the property which was costing them hundreds of dollars per month to carry, they came back and were willing to negotiate a lease, and the offer made to them and accepted by them, of a ten cent royalty,

(Testimony of F. S. Richards.)

was not the fair market of the limestone. It was a question of taking it or leaving it and holding your [256] place forever, and it was so stated to them at the time, and we took it at any figure we cared to name. If they wanted us to take it under those conditions, we would take it and handle it as we saw fit, paying them, as the agreement called for, the minimum amount to be paid each year, but to be accumulated against the royalties.

Therefore it cannot, in any sense, be used as a valuation for limestone in place.

This map (Exhibit 2) shows the aerial tram as originally surveyed, going straight to the plant, turning slightly out of line in order to secure a good location, and reaching the deposit almost as a straight line. A further line shows the diversion of that line to 34, 35 and 36, and by a narrow leg reaching the Gabilan property.

The line I speak of is a faint black line and I will mark it "aerial survey" (marking on map). I have now marked this line "aerial survey". I am writing the word "Original" on the original leg. That was changed to a new one, on which I will write "later survey", and these designations are on petitioner's Exhibit No. 2.

On

Recross Examination

Witness Richards testified as follows:

The Redwood City plant of the Pacific [257] Portland Cement Company was located near San

(Testimony of F. S. Richards.)

Francisco for the purpose of making cement out of oyster shells. The plant was 27 miles from the heart of San Francisco. I described this location as about 5½ miles from President Hoover's home, Stanford University. I have a faint recollection that the 96 acres upon which that plant was erected cost about $76,000.00. That is probably fairly correct. I have no recollection that the piling that was found necessary to put there cost about $12,200. My recollection is that that figure of $12,200 was the cost of a few test piles that were driven, one here and one there, to find out what would be necessary to use when they came to build the plant.

I have a definite recollection that the cost of preparing the foundations of that plant ran into the figure that I named, approaching one million dollars. That consisted of driving piles for the foundation for a dock, the building of the dock, several hundred feet in length on two sides of the plant, the property. It consisted of driving piles to support every piece of equipment, every piece of structural steel, every building, barring one or two office buildings, on the entire property. There is no support to the land on which the plant is located other than through piling. Practically [258] the one million dollars was spent in preparing the foundation, the preparation of the location, which would not have been necessary had they been able to get a solid foundation, such as existed in the San Juan location. I would not say that that was an excessive expenditure if there was available 42,000,000 tons

(Testimony of F. S. Richards.)

of cement (oyster shells), but it is an added cost, a factor which must enter into the problem of utilizing shells as compared with limestone. The railroad extension to reach the property is somewhere about 2½ miles—the railroad to reach the plant connecting with Redwood City, and built over very bad ground on which to build a railroad.

On Re-Direct Examination Witness Richards testified as follows:

I went with the Old Mission Portland Cement Company in January 1926. I acted as assistant to Mr. McCarthy, as general manager, and had knowledge of the major portion of the so-called donations that were made during the year 1926. I was called in conference. In many cases I actually made the recommendations myself.

In general, let me say that the policy which Mr. McCarthy had established, and which I not only confirmed, but urged the increase of, was that of general pressing of the community interest, so far as the plant organization was concerned and the contact of the cement company with its own public as a buying public. [259] With seven years' direct experience of contact with community interests, where I had the whole community under my supervision, I had learned probably some things which many of our officers had not confronted here, that the welfare of the company and the success of the company largely depended upon the good-will and the community interest established between the company, its employees and its public with which it had to deal.

(Testimony of F. S. Richards.)

I spoke especially of Australian conditions, in regard to which the newspapers gave us a record in Australia, under the most disruptive conditions of labor in the English-speaking countries; that is, a series of strikes and strike records. Whether it is to my credit or otherwise, I went into that company in 1916, and between 1916 and 1923, during the various operations there, I had but one strike. With no efforts made to sell, our plants operated at their full capacity during the entire period. In other words we were able to sell through out ability to make friends of the public, to meet the public a little over half way, and to meet our men in the same way, and to pay consistently good dividends throughout the entire period.

I have tried to adopt that same method in all of the companies that I have come in contact with in this country since, and I believe with satisfactory results. [260]

Applying that very thing to the Old Mission Portland Cement Company, I think you will find that despite the general slight trend of lower prices, the company returned, on a smaller volume in 1926, much better than it had on a larger volume in former years.

That is shown in spite of the fact that our contribution item has jumped to a larger extent, and I think, in explanation, a few of these larger items, I can show you that the benefits gained were real.

With respect to the donations made by the Old Mission Portland Cement Company in 1926, (Peti-

(Testimony of F. S. Richards.)

tioner's Exhibit No. 16), the next largest item "All California Highway Lobbying $3,000.00" is a misnomer, so far as the book entry is concerned. Possibly the term "lobbying" might be interpreted as being correct. At the time that I joined the company California was discussing the question of increasing her gas tax. We had a tax of two cents per gallon on gas, which was applied purely as a maintenance fund, and it was essential, if the road campaign was to keep abreast with the growth of the State and the need of the highways with the immense population of motor cars, more than 2,000,000 in the State of California, and only two north and south roads existing for the length of [261] the State—it was essential that new construction be put under way. Those highways were largely of concrete. Even black top roads are based on concrete, and oil surface roads are largely based on concrete.

It was a direct return to the company that they should contribute, and my recommendation for that contribution was not $3,000. It was $10,000, but we were only called upon for $3,000. It was a Statewide campaign for a referendum to increase that tax, applying one cent for new road construction over a period of twelve years, and the referendum was secured, and as a result the State of California today is spending better than $40,000,000 a year on its highway program.

The next largest item is that of the Y. M. C. A. for the benefit of Army and Navy boys from San Francisco. I am rather proud to say that we have

(Testimony of F. S. Richards.)

seldom less than 12,000 and usually in the neighborhood of 30,000 boys living amongst us all the time. A large Y. M. C. A. building was built on the water-front, entirely separate from the other institutions of the city, and the contribution made in this case was laid on the proportional basis, so far as the cement supplied for the building concrete construction work was concerned. We received our proportion of the cement for that individual job, and for other work in the immediate vicinity which came under [262] the Y. M. C. A. work.

The next item is "Community Chest $1,000.00". San Francisco, like many of the other cities of the country, maintained a Community Chest fund, which is practically an assessment upon the industry and those who are capable of giving it. If we do not contribute, we are placarded; we are blacklisted, so far as publications are concerned. Every Community Chest contribution of any size is listed in the daily papers as it comes in. From the standpoint from which I look at those things and which I am certain the company looks at them, because I know most of the men making up the company, they feel that the welfare of the community is taken care of—the needs of the community, the extreme needs of the community, are taken care of—by the Community Chest, and they are just as much a part of our general expenses or demands upon the corporation as are those things which may come directly as a labor charge upon our books. I believe today that most of us have begun to believe that

(Testimony of F. S. Richards.)

we are our brother's keeper to a certain extent, and the Community Chest of San Francisco takes care of those things which we as individuals have no time to take care of, and which would go undone were it not for these community organizations. Boys' Clubs; my own personal contact with the Community Chest in San Francisco was in 1923. Before I went to San Francisco to live I came in contact with the Columbia Park Boys' Club, [263] an organization of boys which had made their way for many years, traveling around the world many times with a band, paying their way, really an educational institution which was living on charity. Out of that organization have come some of the prominent musicians of the country.

Later I came in contact, through that organization, with amateur politics, and I feel certain that any community which does not do what the Community Chest of San Francisco is doing is losing a wonderful opportunity.

On Re-Cross Examination Witness Richards testified as follows:

I don't know that I could say that it was a fact that a substantial portion of the fund raised for the All California Highway Lobbying was to elect a Governor of the State of California who was favorable to good roads. The whole campaign, so far as I was concerned, was a question of referendum on the one cent tax. If any portion of it was allotted to the election of an individual Governor or

(Testimony of F. S. Richards.)

to any individual party, it certainly was done without my knowledge. I do not believe that fund was contributed to be used in the Governor's election. I think it was entirely devoted to the road fund. I think there was at that time a campaign going on for Governor. I do not know that one candidate was favorable to good roads more than [264] the other. I would rather be inclined to feel that if there was difference in the two candidates, one represented the central part of the State and the other represented the southern part. There might have been some inference drawn from that, but my knowledge of the politics of California was not old enough to interpret what might have been behind any such partisan or local campaign. The funds were not raised on the question of passing a law in the ordinary sense. It was a State-wide referendum which we have the practice of using in California for the establishment of a tax. Rather than an act of the legislature, it is a referendum on which the entire State voted. Therefore the campaign fund for it had to be spread over a rather wide territory.

The Y. M. C. A. for which the $2,500.00 was donated was located on the Embarcadero, just to the South of the front of the Ferry Building in San Francisco proper, and purely for the benefit of the soldiers and sailors who are located in San Francisco.

The Old Mission Portland Cement Company contributed to the Industrial Association of San Francisco the sum of $300.00 in 1924, $1800.00 in 1925,

(Testimony of F. S. Richards.)

and $1800.00 in 1926. At the time I went to San Francisco (January, 1926) the unions were practically in control of the building trades and a definite effort was being made by the Industrial Association, representing the various manufacturers, contractors, and builders, to maintain the true American [265] policy of an open shop,—a job for everyone that was capable of holding a job, permitting him to carry out that work.

The unions had gone out in direct competition with us. They brought in cargoes of cement from Belgium and piled it on the docks and unloaded it in public warehouses and established their own building material yards for distribution of building materials, in direct competition with the already established industries. They distributed the materials to the jobs which they controlled.

The work of the industrial association was simply that of organizing the fight and maintaining it until we won the right of every individual to an equal share of the work that was offered by the building programs on the Coast.

At one time, just prior to my going out there, the unions had the erection of steel completely tied up. In fact, there were no big buildings that we could get cement onto whatever, and the Industrial Association, through this organization, was able to open up the situation and to get non-union men, who were residents of San Francisco, to start in on that work, and they finally wound up with all union men working under open shop conditions. I per-

(Testimony of F. S. Richards.)

sonally had three hundred men working on one job on strictly open shop.

The Unions applied the principle there, [266] exactly as the international heads were always applying it all over United States, that you must have a union man with a union card in his pocket.

In connection with the $1,000.00 donated to the Community Chest fund I know personally that the three principal officers of the Old Mission Portland Cement Company, Mr. Humphrey, Mr. Fleischacker, and Mr. McCarthy, each contributed larger sums than the one contributed by [267] the Company. If the petitioner (Old Mission Portland Cement Company) had not made this donation I know that the placard would have not have appeared on the door that they were contributors to the Community Chest; the name would not have appeared in the daily papers, several in number, and I know that the major portion of the business section of the City would have known in a short time that we were not contributors, because I know of a number of cases where that word has been passed around as to who contributed and who had not contributed. I would not say it is a black list. It is next door to it, however. In a sense it was a forced donation. That applies each year. They tell us what they want from us. The next year they come back and say they want $1500 in place of $1000 and it is pretty hard to get out of having to put it up. One might consider that we made the donation through fear of something likely to happen to our business.

(Testimony of F. S. Richards.)

I would state frankly that I do not believe this corporation considered it that way, but that is the general situation that exists, however. Personally, as far as this company is concerned, they make the donation regardless of any of those facts or conditions. I knew the attitude of the individuals. I know them well enough to know that those factors do not enter, and I want to make it plain that that is the actual situation. Any donations of that class do actually cover the entire community organizations which can be kept under a reasonable control [268] by the city organizations. In this case the petitioner made the donation as a voluntary gift and not through fear of its business.

The parties stipulated that in arriving at the consolidated net income for the years 1923, 1924, 1925 and 1926, respondent has allowed as deductions the sum of $375.99 for each of the first three years named and $220.79 for the year 1926, in respect of amortization of bond discount on the bonds of the California Central Railroad Company; that the total amount of amortization of bond discount for the respective years was $3,381.18, and the difference between this amount and the amount allowed by the respondent, as heretofore stated, represents the amortization of bond discount applicable to bonds of the California Central Railroad Company owned by the Old Mission Portland Cement Company for the respective periods, the Old Mission Portland Cement Company being the parent during those years and the peti-

tioner in this case.

The parties stipulated and agreed that the books and records of the Old Mission Portland Cement Company, the California Central Railroad Company and the San Juan Pacific Railroad Company [269] were kept on the accrual basis during the years 1923 to 1926, inclusive.

The parties stipulated that Exhibits 4, 5, and 6, which had been heretofore marked for identification, correctly set forth the items as shown by the books as subscriptions and contributions, ordinarily termed donations, which had been disallowed by the respondent in arriving at the net income for the respective years 1923, 1924, and 1925.

Exhibits 4, 5, and 6 were thereupon received in evidence as Petitioner's Exhibits 4, 5, and 6. The amounts shown in detail on those exhibits are the items which have not been allowed by the Commissioner.

The parties stipulated that the amounts shown on a sheet to be designated as petitioner's Exhibit No. 16 correctly reflect the book entries of items of subscriptions and contributions ordinarily referred to as donations which have not been allowed by the Commissioner as deductions in the computation of the net income for 1926.

Exhibit 16 was thereupon received in evidence as Petitioner's Exhibit No. 16.

The parties stipulated that the stock issued by the petitioner, the Old Mission Portland Cement

Company, in 1912, and all stock issued subse- [270] quent to that time, up to about 1918, was common stock.

Thereupon respondent offered in evidence the 1912 income tax returns of petitioner for the purpose of showing the income of the corporation during that year. Thereupon the following proceedings took place:

"Mr. Goodner: (Counsel for petitioner). I do not see that that is at issue, what the income of the corporation was in 1912. The years involved are 1923, 1924, 1925 and 1926. However, I am willing to admit, if it will help counsel, that there was no income in 1912; but as far as filing the return for proof of that, I can see no probative value, and therefore object to the introduction of the return.

The Member: The objection is overruled. It may be material. I do not know what is in the return. It will be received as Respondent's Exhibit C.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit C' and made a part of this record.)

Mr. Goodner: For the purpose of the record, may I note an exception, your Honor?

The Member: Exception noted."

* * * * * * * *

"Mr. Adams: (Counsel for Respondent). I offer in behalf of the respondent the income tax return filed [271] by the petitioner for the year 1913.

Mr. Goodner: What is the object of this?

Mr. Adams: The same purpose.

Mr. Goodner: Let the objection be the same, without restating it.

The Member: All right. It will be received and marked as Respondent's Exhibit D.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit D' and made a part of this record.)

Mr. Goodner: Your Honor will let the exception run to each one of these objections?

The Member: Yes, the objection is made to the offering in evidence of these returns prior to 1923, I take it?

Mr. Goodner: Yes; that is correct.

The Member: The objection is overruled, and an exception taken to each one.

Mr. Goodner: Yes.

Mr. Adams: I offer in behalf of the respondent the income tax return filed by the petitioner for the year 1914.

Mr. Goodner: The same objection.

The Member: The same ruling. It will be received and marked as Respondent's Exhibit E.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit E', and made a part of this record.)

[272]

Mr. Adams: I offer on behalf of the respondent the income tax return filed by the petitioner for the year 1915.

Mr. Goodner: What is the purpose of that, Mr. Adams?

Mr. Adams: The same purpose.

Mr. Goodner: The same objection.

The Member: The same ruling.

Mr. Goodner: It is understood, however, that there is an exception noted to each and every one?

The Member: Yes; that was my ruling. It will be received and marked as Respondent's Exhibit F.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit F', and made a part of this record.)

Mr. Adams: I offer in evidence the income tax return filed by the petitioner for the year 1916.

Mr. Goodner: The same purpose?

Mr. Adams: Yes.

Mr. Goodner: The same objection.

The Member: The same ruling. It will be received and marked as Respondent's Exhibit G.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit G', and made a part of this record.)

Mr. Adams: I offer the income tax return filed by the petitioner for the year 1917.

The Member: It will be received as Respondent's [273] Exhibit H.

Mr. Goodner: Before I make any objection to this, your Honor, I would like to ask counsel if he knows whether there were any schedules of any kind attached. This appears to be the form of return prescribed for the year 1917, and, of course, I have no copies of it here, and I just wondered if there were any schedules attached.

Mr. Adams: No.

Mr. Goodner: And you offer it for the same purpose?

Mr. Adams: Yes.

Mr. Goodner: The same objection.

The Member: The same ruling. It will be received and marked Respondent's Exhibit H.

(The document so offered and received in evidence was marked 'Respondent's Exhibit H', and made a part of this record.)

Mr. Adams: I offer in evidence the income tax return filed by the petitioner for the year 1918.

Mr. Goodner: And that is offered for the same purpose?

Mr. Adams: The same purpose.

Mr. Goodner: The same objection.

Mr. Adams: In that case, it is to show the income and show the amount claimed for depletion and the rate of depletion. [274]

The Member: It will be received and marked as Respondent's Exhibit I.

Mr. Goodner: Then, I want to re-word my objection, your Honor, to the offer. The purpose of the offer is wholly incompetent, irrelevant and immaterial, in that the year 1918 is not at issue before the Board, and the question of income is not in dispute, and the question of depletion claimed in the tax return is not in dispute, in that the Commissioner of Internal Revenue has, by his own action and determination, denied the correctness of the contention, and it has no probative value whatever.

The Member: The objection is overruled.

Mr. Goodner: And an exception noted.

The Member: Exception noted.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit I', and made a part of this record.)

Mr. Adams: I offer the income tax return filed by the petitioner for the year 1919.

Mr. Goodner: That is the same as the last one?

Mr. Adams: For the same reason—income and depletion.

Mr. Goodner: Then, let the objection be the same as the last offer.

The Member: Overruled. It will be received and marked as Respondent's Exhibit J.

Mr. Goodner: And I note an exception. [275]

The Member: Exception noted.

(The document so offered and received in evidence was marked 'Respondent's Exhibit J' and made a part of this record.)

Mr. Adams: The income tax return filed by the petitioner for the year 1920 is offered.

Mr. Goodner: For the same purpose?

Mr. Adams: For the same purpose.

Mr. Goodner: And let the objection be the same.

The Member: The objection is overruled. It will be received and marked as Respondent's Exhibit K.

(The document so offered and received in evidence was marked 'Respondent's Exhibit K', and made a part of this record.)

Mr. Adams: The income tax return filed by the petitioner for the year 1921 is offered.

Mr. Goodner: For the same purpose?

Mr. Adams: For the same purpose.

Mr. Goodner: The same objection.

The Member: Overruled. It will be received and marked as Respondent's Exhibit L.

Mr. Goodner: Exception.

The Member: Exception noted.

(The document so offered and received in evidence was marked 'Respondent's Exhibit "L", and made a part of this record.)

[276]

Mr. Adams: The income tax return filed by the petitioner for the year 1922 is offered.

Mr. Goodner: For the same purpose?

Mr. Adams: For the same purpose.

Mr. Goodner: Possibly the offer should show that that includes both the tentative and completed returns as one offer.

Mr. Adams: Yes.

Mr. Goodner: And for the same purpose as the prior offer?

Mr. Adams: The same purpose.

Mr. Goodner: Let the objection be the same.

The Member: The objection is overruled. It will be received and marked as Respondent's Exhibit M.

(The document so offered and received in evidence was marked 'Respondent's Exhibit M', and made a part of this record.)

Mr. Adams: I offer the income tax return filed by the petitioner for the year 1923.

Mr. Goodner: The same purpose?

Mr. Adams: The same purpose.

Mr. Goodner: No objection.

* * * * * * * *

The Member: Do you wish to offer the photostat in place of the original?

Mr. Adams: Yes, your Honor.

The Member: Then, that will be received as Respondent's Exhibit A. [277]

(The photostat of the income tax return filed by the petitioner for the year 1923, was thereupon marked 'Respondent's Exhibit A', and made a part of this record.)

Mr. Adams: I offer in evidence the income tax return for the year 1924, filed by the petitioner for the same purpose.

The Member: It will be received as Respondent's Exhibit P, in place of the one that was marked for identification as Respondent's Exhibit B.

Mr. Goodner: I have no objection. * * *

* * * * * * * *

(The document was thereupon received in evidence, marked 'Respondent's Exhibit P', and made a part of this record.)

Mr. Adams: I offer in evidence the income tax return filed by the petitioner for the year 1925.

Mr. Goodner: No objection * * *

The Member: * * * It will be received and marked as Respondent's Exhibit N.

(The document so offered and received in evidence was marked 'Respondent's Exhibit N', and made a part of this record.)

Mr. Adams: I offer in evidence the income tax return filed by the petitioner for the year 1926. [278]

The Member: It will be received and marked as Respondent's Exhibit O.

Mr. Adams: That is for the same purpose.

Mr. Goodner: No objection, subject to check to see that it is complete.

(The document so offered and received in evidence was marked 'Respondent's Exhibit O', and made a part of this record.)

Mr. Adams: I might state that they are all certified photostatic copies of the returns themselves.

I offer in evidence on behalf of the respondent a form marked 'Form F', including exhibits attached thereto. I might say that this form is filed in connection with the depletion claimed by the petitioner, and is a report on the depletion. I offer it in evidence for consideration in determining the proper depletion in this case.

Mr. Goodner: May I have a minute to look this over?

The Member: Very well.

Mr. Adams: That has already been marked for identification, your Honor, as Respondent's Exhibit B. * * *

Mr. Goodner: What is the purpose of this offer?

Mr. Adams: As to the history of the organization and as to the basis on which they showed the consideration which they gave to the question of values, the [279] rate of depletion which was proper as a deduction, explaining the history of the company and the computation on which claim for depletion

should be allowed, which is less than is now being claimed.

Mr. Goodner: If the offer is for the purpose stated by counsel, I have no objection to its being received.

The Member: That exhibit is identified as Respondent's Exhibit B, and will be received in evidence as Respondent's Exhibit B.

(The document so offered and received in evidence was marked 'Respondent's Exhibit B', and made a part of this record.)

Mr. Adams: If your Honor please, I offer in evidence the capital stock tax return filed by the petitioner ended June 30, 1917. * * * *

Mr. Goodner: A certified photostatic copy. There is no objection to the form of the offer, but objection is made to the receipt of the offer on the ground that it is incompetent, irrelevant and immaterial, and it is not proper to furnish a basis in support of the March 1, 1913, fair market value. The capital stock tax returns are based on something else altogether. I did not ask counsel the purpose of the offer, but I suppose it is in connection with the fair market value. [280]

Mr. Adams: It will have a bearing, your Honor, as respondent contends, in the final decision of this case.

The Member: The objection is overruled.

Mr. Adams: And I will substitute a photostatic copy for the original, your Honor.

Mr. Goodner: May I note an exception?

The Member: Yes; exception noted. The photo-

static copy will be received as Respondent's Exhibit Q.

(The document so offered and received in evidence was marked 'Respondent's Exhibit Q', and made a part of this record.)

Mr. Adams: The same thing as to the capital stock tax return headed 'Return, Fair Value, Capital Stock for the Fiscal year ended June 30, 1918,' a certified photostatic copy.

The Member: It will be received as Respondent's Exhibit R.

Mr. Goodner: Note the same objection to the last offer.

The Member: Yes. The objection is overruled and an exception noted.

(The document so offered and received in evidence was marked 'Respondent's Exhibit R,' and made a part of this record.)

Mr. Adams: I offer in evidence the capital stock tax return, which shows under item 7, the return as at the close of the fiscal year ended June 30, 1919, a certified photostatic copy. [281]

Mr. Goodner: The same objection as to the last offer.

The Member: Overruled.

Mr. Goodner: An exception noted.

The Member: Exception noted. It will be received and marked as Respondent's Exhibit S.

(The document so offered and received in evidence was marked 'Respondent's Exhibit S', and made a part of this record.)

Mr. Adams: I offer the capital stock tax return, marked at the top '1921 return', certified photostatic copy.

The Member: It will be received as Respondent's Exhibit T.

Mr. Goodner: The same objection.

The Member: Overruled.

Mr. Goodner: And an exception noted.

The Member: Yes; the objection is overruled and an exception is noted.

(The document so offered and received in evidence, was marked 'Respondent's Exhibit T', and made a part of this record.)

Mr. Adams: I offer the capital stock tax return for 1922 filed by the petitioner.

Mr. Goodner: The same objection. [282]

Mr. Adams: I offer a certified photostatic copy.

The Member: Overruled and an exception noted. It will be received as Respondent's Exhibit U.

Mr. Goodner: I note an exception.

The Member: Yes; exception noted.

(The document so offered and received in evidence was marked 'Respondent's Exhibit U', and made a part of this record.)

Mr. Adams: I offer in evidence a claim filed by the petitioner in this case relative to its capital stock tax.

Mr. Goodner: Let me see that.

Mr. Adams: Yes (handing the document to Mr. Goodner).

Mr. Goodner: This appears to be an abatement

claim filed in connection with the capital stock tax return for the fiscal year ending June 30, 1917.

Mr. Adams: I might say that it refers to the capital stock tax return which has been marked Respondent's Exhibit Q, referring to the tax that was assessed upon that return, in which it sets forth the history of the company, the formation of the company, the assets acquired, etc., and it is properly sworn to by an officer of the corporation.

Mr. Goodner: Objection is made to this, your Honor, for the reason that it involves a year not in issue here, and for the further reason that it [283] is signed by someone whose name is A. Probert, assistant secretary. I will not deny the signature, but the party is not here to be cross-examined. I do not know the source of the information that may be set forth in the purported copy of letters attached to the claim, and I think for that reason it is wholly irrelevant, incompetent and immaterial and inadmissible.

The Member: The objection is overruled.

Mr. Goodner: May I note an exception?

The Member: Exception noted. It will be received and marked as Respondent's Exhibit V.

(The document so offered and received in evidence was marked 'Respondent's Exhibit V', and made a part of this record.)

Mr. Adams: I offer in evidence on behalf of the respondent a letter dated July 21, 1924, signed by an officer of the corporation, in which the history of the corporation is contained. I offer that as an

admission against interest.

Mr. Goodner: The offer is objected to for the reason that it is incompetent, irrelevant and immaterial, the party signing the letter is not present, and we have had no opportunity to cross-examine him. There is no showing as to the source of information [284] contained therein and it is not binding upon the corporation without such a showing.

Mr. Adams: We offer it as an admission. It is properly signed by an officer of the corporation, in connection with the organization and the assets of the corporation.

Mr. Goodner: I might add further that this is a letter not sworn to, and therefore, I think entirely beyond the realm of admissible evidence. I am not going so far as to dispute the signature. I think the signature is genuine.

The Member: The objection is overruled.

Mr. Goodner: I will note an exception.

The Member: Exception noted. It will be received as Respondent's Exhibit W.

(The document so offered and received in evidence was marked 'Respondent's Exhibit W', and made a part of this record.)

Mr. Adams: Your Honor, I offer in evidence a letter signed by an officer of the corporation, dated September 4, 1924, in which reference is made to the corporation's history and the value of its assets. I offer that on the same basis as I offered the previous letter, your Honor.

Mr. Goodner: I make the same objection, your Honor. [385]

The Member: The objection is overruled.

Mr. Goodner: I note an exception.

The Member: Exception noted. It will be received and marked as Respondent's Exhibit X.

(The document so offered and received in evidence was marked 'Respondent's Exhibit X', and made a part of this record.)

Mr. Adams: Your Honor, I offer in behalf of the respondent, as an admission against interest, and signed by an officer of the corporation, under the heading 'Old Mission Portland Cement Company', which is an admission made against interest, the same as I offered the previous letter——

The Member: What is the date of that letter?

Mr. Adams: June 6, 1924.

Mr. Goodner: I make the same objection, your Honor, and let me add that all of these letters purport to have reference to capital stock tax returns for a period ending other than March 1, 1913.

Mr. Adams: But they give the history of the formation of the corporation.

Mr. Goodner: As far as the history of the formation of the corporation is concerned, I have not read them, and I think it would be proper to object to that, insofar as it has not been covered by evidence here, [286] because this is purely a letter from a party signing as assistant secretary, not sworn to, to whom the petitioner has no opportu-

nity to cross examine. My main objection to these last letters is that they have to do with capital stock tax returns and have no bearing upon the March 1, 1913, fair market value of the petitioner's properties, for depletion purposes.

The Member: The objection is overruled.

Mr. Goodner: I note an exception.

The Member: Exception noted. It will be received and marked as Respondent's Exhibit Y.

(The document so offered and received in evidence was marked 'Respondent's Exhibit Y', and made a part of this record.)

The Member: I might say, Mr. Goodner, that I think possibly the Board would be reversed by the Court of Appeals if we gave very much weight to those letters, but I would rather have them all in the record, even though they are not very material, because, if we leave anything out of the record, the higher courts would say that they would like to know what is in them, and for that reason I am usually of the mind to let in the record material that possibly, if we were trying the case before a jury we would not let in. [287]

Attached hereto and made a part of this Statement of Evidence are true copies of the material parts of Exhibits 1 to 12, inclusive, and 16, introduced in evidence by Petitioner, and Exhibits B, V,

W, X, and Y, introduced in evidence by Respondent.

I hereby certify that the foregoing is a true and correct narrative statement of all the oral evidence introduced in this proceeding which, with the exhibits hereto attached and those to be sent to the Court under its order, is material to the assignments of error set out in the petition for review.

(Signed) GEO. E. H. GOODNER,
Counsel for Petitioner.

I have no objection to the foregoing statement of evidence and the accompanying exhibits.

(Signed) C. M. CHAREST,
Counsel for Respondent.

Settled and approved this 22 day of April, 1933.

CHARLES P. SMITH,
Member, U. S. Board of Tax Appeals. [288]

EXHIBIT 1

Reviewed Nov. 25, 1927
Reviewer LF
(This valuation is based on information at hand and is subject to verification, correction or revision.)
IT:CR:En:M
JS

CONSOLIDATED RETURNS AUDIT DIVISION
Engineering Section
Mining Subsection.
Valuation Memorandum.
November 18, 1927.

In re: Old Mission Portland Cement Company (Parent), California Central Railroad Company (Subsidiary), San Juan Pacific Railway Company, (Subsidiary), San Francisco, California.

Operating owner of Limestone Deposits	Open years 1923, 1924, 1925, 1926 and 1927 to March 31st.

Reference IT:CR.

1. Required—Valuations and allowable depletion in 1923, 1924, 1925, 1926 and 1927.

2. This case was investigated in the field according to Engineer Revenue Agent's Report of November 3, 1927. The report recommends a March 1, 1913 value of limestone of $63,121.00 based on discounting a royalty rate of ten cents per ton, which was paid by taxpayer on a contract in effect for the first time in 1920. The resulting March 1, 1913 value is further discounted by a five year deferment from 1913 to the start of quarry operations in 1918. Although the foregoing valuation is not supported by a royalty rate effective in 1913, it is recommended that it be tentatively approved, as taxpayer has been unable to submit an acceptable basis of valuation.

3. Valuation: The approved figures taken from the Engineer Revenue Agent's report of November 3, 1927, are, therefore, as follows:

March 1, 1913 value of limestone—$63,121.00.
Reserve—1,700,000 tons
Depletion rate—$0.03713 per ton

Depletion Schedule.

Year	Production Tons	Depletion Claimed	Depletion Allowed
Prior	550,346	$77,135.63	$20,434.34
1923	241,684	48,336.87	8,973.73
1924	212,116	42,423.29	7,875.87
1925	247,017	49,403.33	9,171.74
1926	246,046	49,209.28	9,135.69
1927	63,275	$12,655.02	2,349.33
	1,560,482		57,940.70

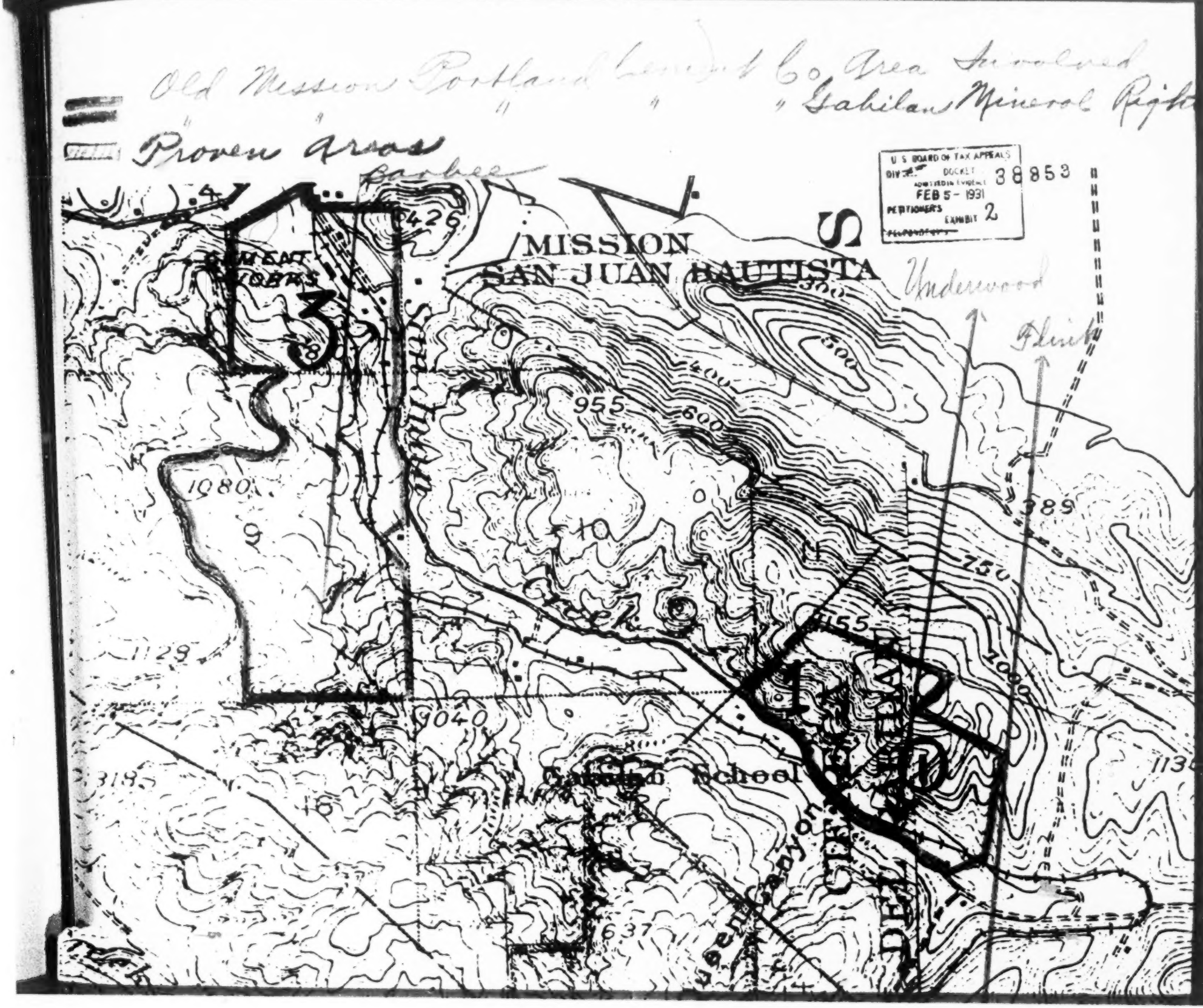
[289]

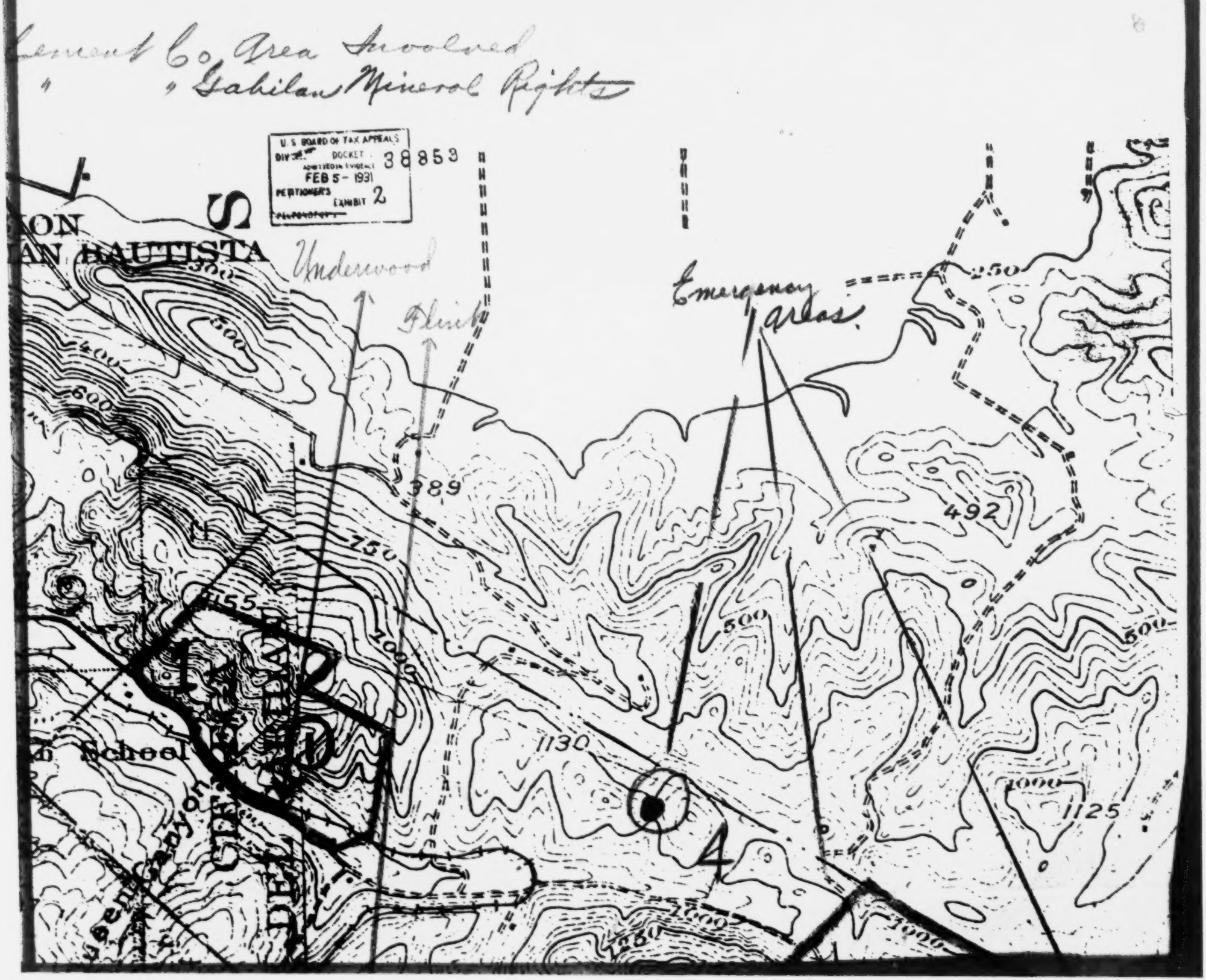
Remaining tons—139,518
Remaining depletable value—$5,180.30

Approved by:
E. P. McCRORKEN,
Chief, Mining Subsection.

Recommended by:
(Signed) JOHN SEWARD,
Valuation Engineer.

(Note: The foregoing Exhibit 1 was introduced in evidence solely for the purpose of showing how the Commissioner of Internal Revenue arrived at the depletion deductions.) [290]


Old Mission Portland Cement Co. Area Involved
" " " " Gabilan Mineral Rights
" " Proven Areas
Barbee
U.S. BOARD OF TAX APPEALS
DOCKET 38853
ADMITTED IN EVIDENCE
FEB 5 - 1931
PETITIONER'S EXHIBIT 2
MISSION
SAN JUAN BAUTISTA
Underwood
Flint
SOUTHERN PACIFIC
1980
955
1129
9040
3185
637
1138
School


Tenant Co. Area Involved
" Galilan Mineral Rights
U.S. BOARD OF TAX APPEALS
DOCKET 38853
ADMITTED IN EVIDENCE
FEB 5 - 1931
PETITIONER'S EXHIBIT 2
ON
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Underwood
Flint
Emergency Areas
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600
700
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155
1000
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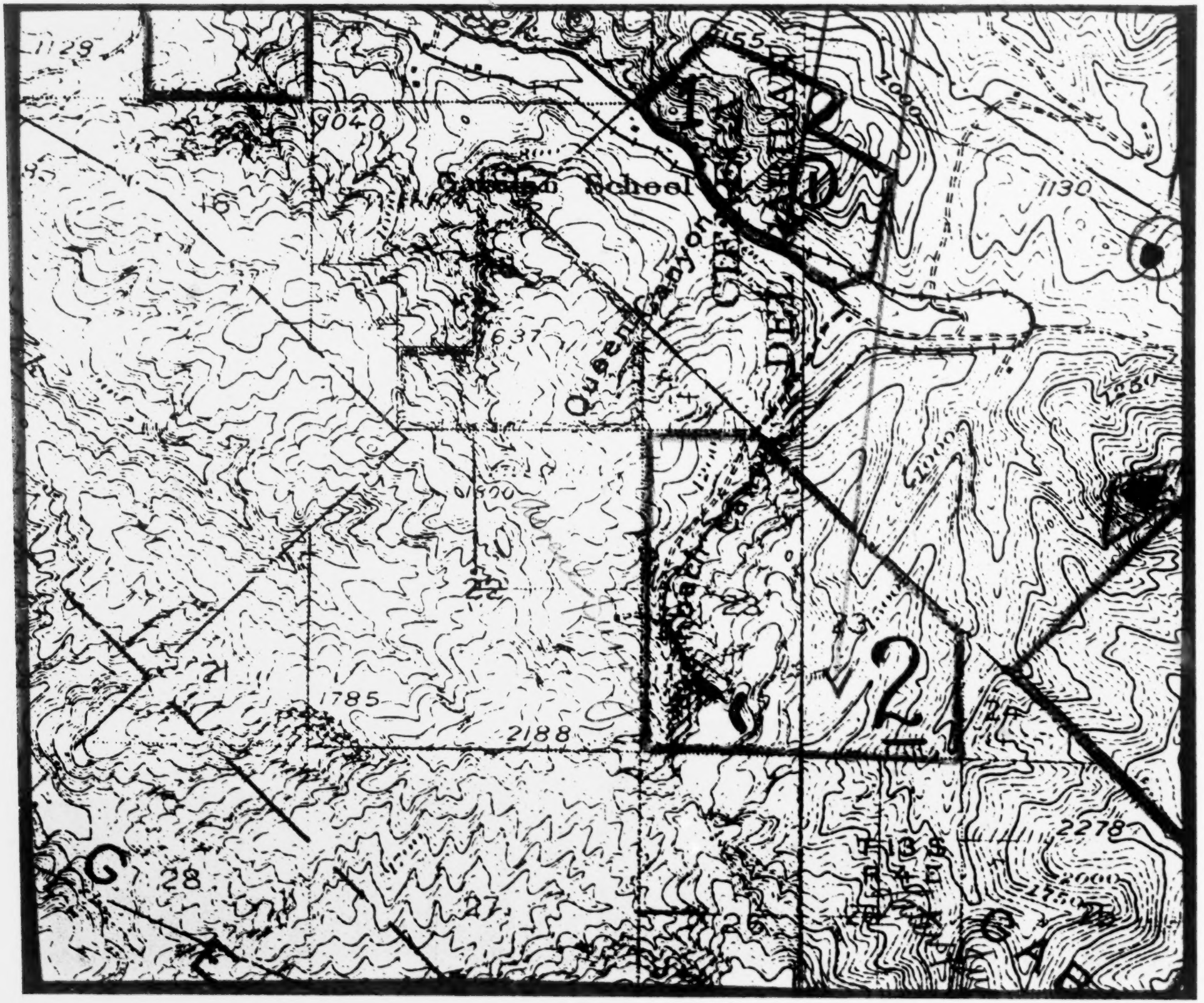
School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School
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Queen Mary's Old Hall
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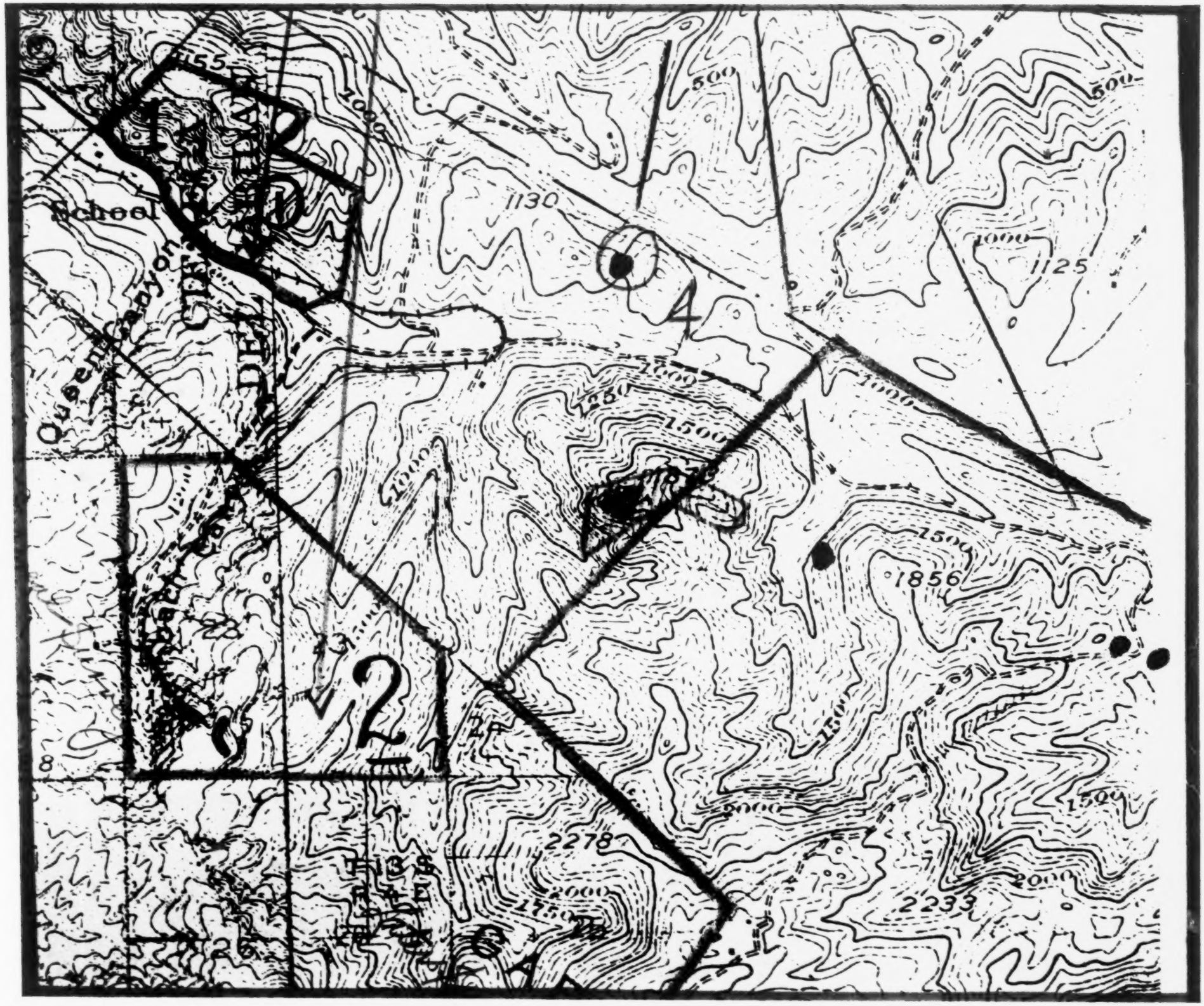
School
Queen Canyon
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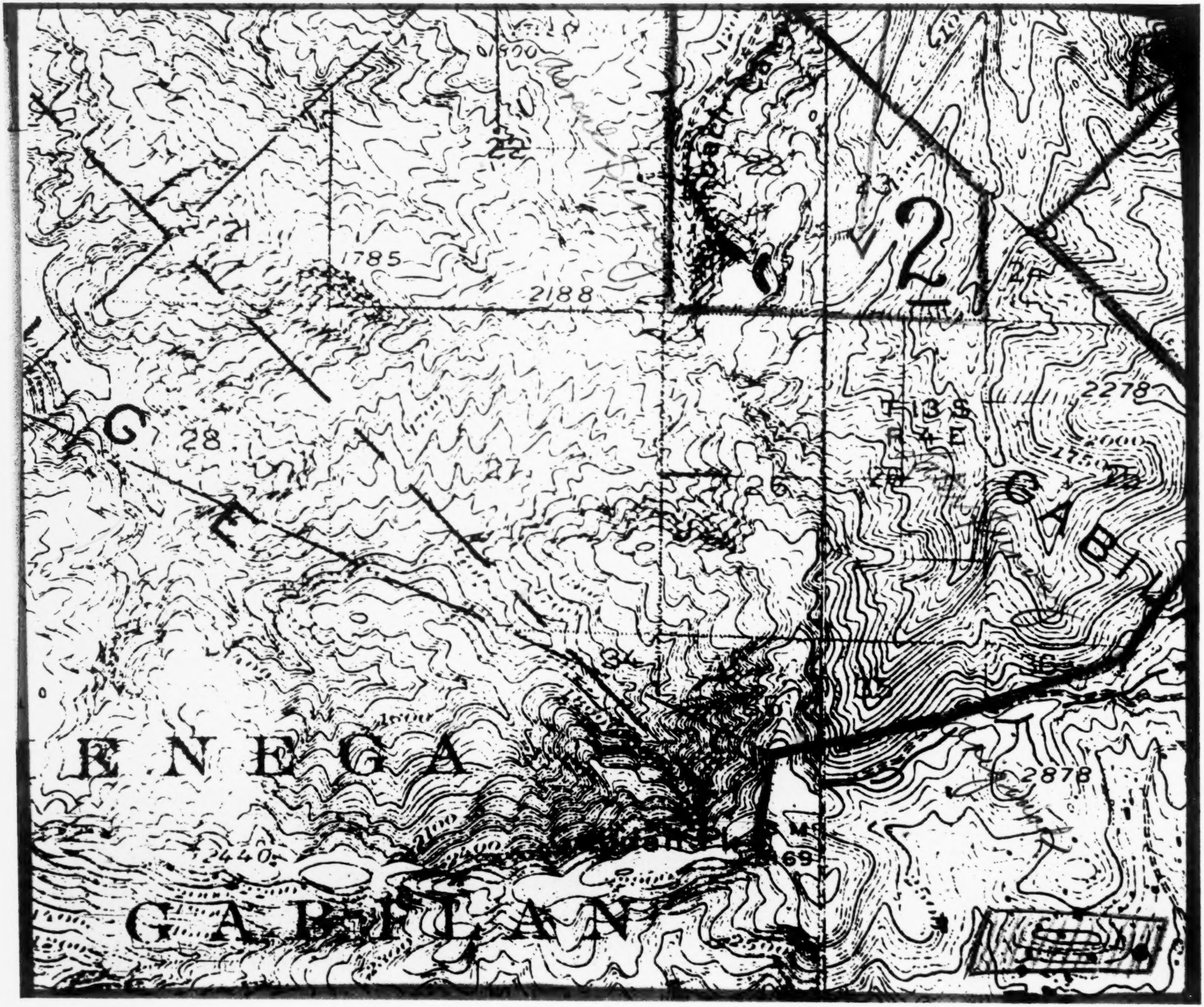
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GABILAN
MOUNTAINS
SAN BENITO CO
GABILAN RANGE
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2878
2810
2500
2000
1500
69

EXHIBIT 4

OLD MISSION PORTLAND CEMENT CO.

Subscriptions and Contributions.

1923

	Book Reference	Amount not Allowed by Commissioner
San Francisco Community Chest	Vo. 4	$1,000.00

(Balance of exhibit not material)

EXHIBIT 5

OLD MISSION PORTLAND CEMENT COMPANY

Subscriptions and Contributions

1924

	Book Reference Page	Amounts not Allowed by Commissioner
Police Ball	Vo. 74	$ 5.00
Community Chest	Vo. 74	1,000.00

(Balance of exhibit not material)

EXHIBIT 6

OLD MISSION PORTLAND CEMENT COMPANY

Subscriptions and Contributions

1925

	Book Reference	Amounts not Allowed by Commissioner
Community Chest	Vo. 161	1,000.00

(Balance of exhibit not material) [293]

EXHIBIT 7
VALUATION OF BARBEE, UNDERWOOD and FLINT DEPOSITS, at San Juan, California. At March 1, 1913

Estimated Deposits—2,000,000 tons

Estimated cost of manufacturing cement, per barrel:

Mill Cost:		
Labor	$ .190	
Power	.100	
Fuel	.185	
Supplies	.125	
Total Mill Cost	$ .600	
Packing Cost	.050	
Total cost F.O.B.	$ .650	
Selling Cost	.100	
Overhead	.075	
Total Manufacturing Cost	$ .825	
Estimated gross profit per barrel of cement:		
Selling price, F.O.B. plant		$ 1.50
Cost of manufacturing		.825
Gross profit per barrel		$ .675
Estimated gross profit per ton of raw mineral:		
Gross profit per barrel of cement		$ .675

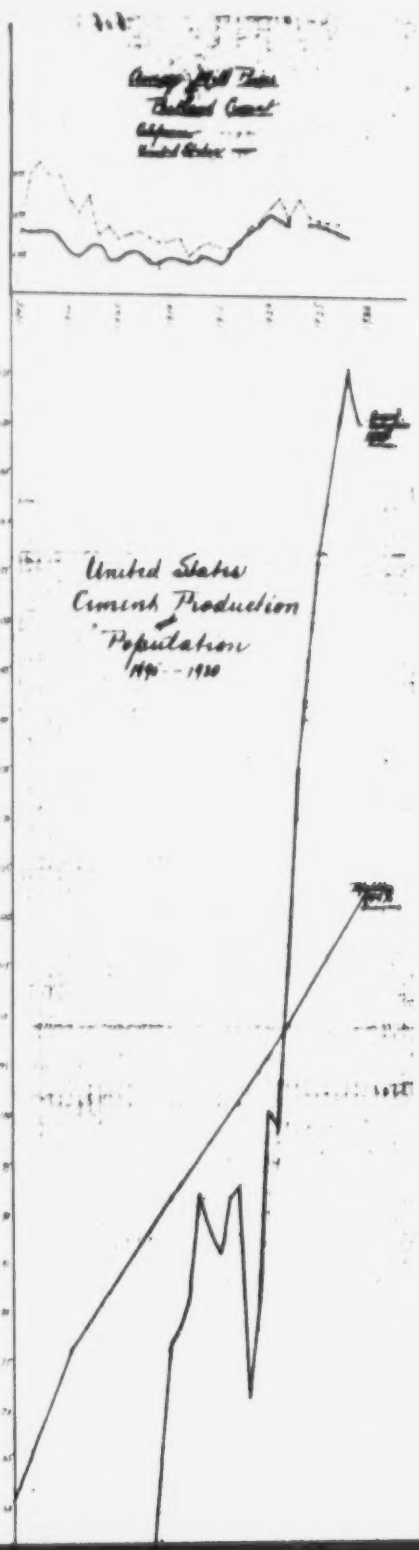
Converted to per ton of raw basis of 3.2 barrels of cement per ton of raw mineral = per ton	$ 2.16	
Computation of value of deposits:		
2,000,000 tons @ $2.16 gross profit per ton = total gross profit		$4,320,000
Present value of deposits based on 10 year life and discount factors of 8% and 4% (Hoskold's Table) before deducting cost of plant, $4,320,000. x .6124		$2,645,568
Deduct:		
Estimated cost of plant		1,000,000
Total value of deposits		$1,645,568
Value of deposits, per ton		$ .822784

(Note: The foregoing Exhibit 7 is the computation of value testified to by witness Ira Judson Coe.)

[294]

F. B. RICHARDS
CONSULTING ENGINEER
324 HILLS BUILDING
SAN FRANCISCO
Based on Rail Costs
to San Francisco
Bay District
120 per ton on Cement
120 - - - - .09¢ -
Value in place compared
with Old Mission
less than 1/2 of
Napa abandoned
Crystal Rubber 5¢ per ton of finished
Calaveras 24¢ "
Yosemite 8¢ "
Knowles 9 3/8¢ " "
Bay
Calaveras
Yosemite
Knowles
Plant
Quarry
Abandoned Plant + Quarry
U. S. BOARD OF TAX APPEALS
DOCKET 38853
FEB 6 - 1931
PETITIONER'S
EXHIBIT 8

H1



U. S. BOARD OF TAX APPEALS
DIV. ..... DOCKET 3
FILED IN THE OFFICE OF THE CLERK
FEB 8 - 1931
PETITIONER'S
EXHIBIT 10

U.S. BOARD OF TAX APPEALS
DIV. ... DOCKET ... 38853
ADMITTED IN EVIDENCE
FEB 6 - 1931
PETITIONER'S
EXHIBIT 11
RESPONDENT'S

California Cement Production and Population 1895–1930

Imports — [redacted]

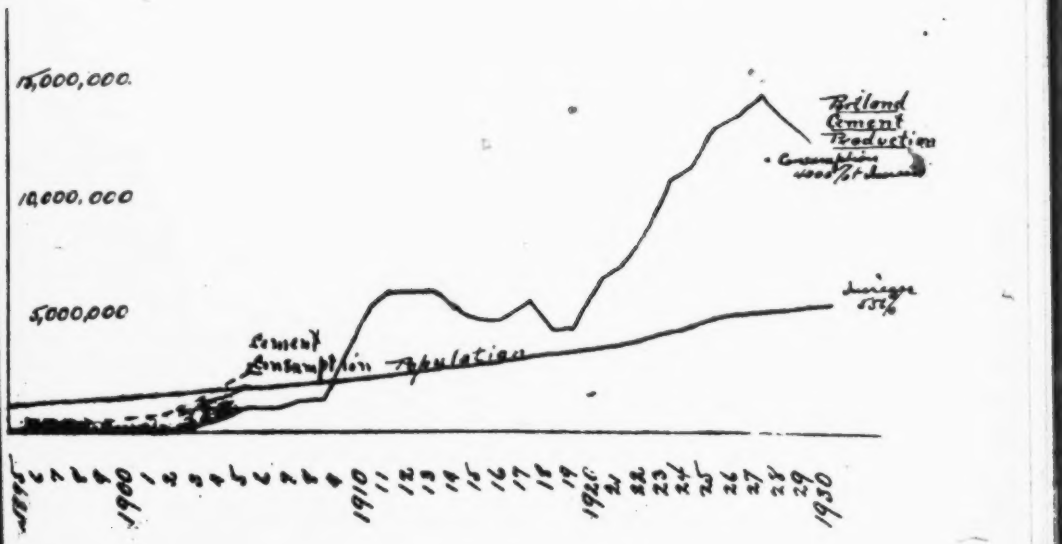


EXHIBIT 12

Operation Record of Cement Production from the Barbee, Underwood, and Flint Deposits by the Old Mission plant.

Total Tonnage removed—1,700,000 tons

1918-1928, inclusive

Revenue by years, before depletion and depreciation

1918	$ 18,551.11
1919	5,391.35
1920	164,406.08
1921	192,011.08
1922	496,844.75
1923	641,502.91
1924	626,021.48
1925	427,133.17
1926	393,221.46
1927	493,477.60
1928	294,460.65
Total - - -	$3,715,959.42
Discount factor Hoskold's—8 & 4 for 11 years	.589748
Discounted value	$ 2,191,479.62
Less ½ of plant cost and improvements	675,059.79
	$ 1,516,419.83

Divided by 1,700,000

Value per Ton .892

(Note: The foregoing Exhibit 12 is the computation of value testified to by witness F. S. Richards.) [299]

EXHIBIT 16

OLD MISSION PORTLAND CEMENT CO.

Subscriptions and Contributions,—1926

	Book Reference	Amounts Not Allowed by Commissioner
Community Chest	Vo. 2966	$1,000.00
Y. M. C. A.	Vo. 3149	2,500.00
All California Highway Lobbying	Vo. 3555-3570	3,000.00

(Balance of exhibit not material) [300]

TREASURY DEPARTMENT
Internal Revenue Service
Form P (Revised June, 1922)

3407

SCHEDULES FOR SUBSTANTIATION OF VALUATION, DEPLETION, AND DEPRECIATION

INORGANIC NONMETALLIC MINERAL PROPERTIES

The data indicated in these schedules should be furnished separately for each operating unit or each property acquired at a different date. No data already submitted need be duplicated if reference is made to date, form, and place of filing.

Name of Taxpayer OLD MISSION PORTLAND CEMENT CO *Address* 433 Mills Bldg., San Francisco

The inorganic nonmetallic minerals include abrasives, asbestos, asphalt (natural), barytes, cement rock, clay (all varieties), feldspar, fertilizers (natural), fluorspar, fuller's earth, graphite, gravel, gypsum, limestone, lithia minerals, magnesite, marl, mica, mineral paints, peat, potash, precious stones, refractories, [illegible], silt, sand (common building, fire, core, molding, engine, glass, etc.), silica, slate, soapstone, soda, stone (building, crushed, pulp, etc.), sulphur, talc and related substances.

If you own or operate a deposit containing mineral of this character and claim a value for same or deduct depletion, this schedule is applicable to your case and must be submitted. If you (a) purchase your raw mineral materials, or (b) do not capitalize nor deplete mineral values, this form should be returned, with a sworn notation specifying which of these facts renders it inapplicable to your case.

Depletion implies "a limited quantity of a valuable substance," the removal of which reduces the value of the property. Therefore, if you claim a value for mineral in addition to the surface value of the land for other purposes, it is necessary that you substantiate such value to the satisfaction of the Commissioner and establish the number of tons or other units contained in the deposit.

SCHEDULE I—COST OF PROPERTY

It is essential that this schedule be completely filled out in all cases notwithstanding valuation is claimed as of another basic date.

1. Name of mine, quarry, etc. Underwood Plant and El Carlota 2. Location and legal description of property Near San Juan San Benito County California

3. What mineral or mineral do you own or produce? Limestone and Shale

4. What method of recovery is employed (surface removal, underground mining, open pits, quarry, drilled wells, dredging, etc.)? Quarrying

5. Taxpayer's status: Fee owner {Yes / No} ..... Operator {Yes / No} Yes Lessor {Yes / No} No Lessee {Yes / No} Yes Extent of interest .....

6. Others interested: (a) Judge E. B. Pearce (Name.) San Juan (Address.) San Benito County (Status.) California (Extent of interest.)

(b) W. Tevis (Name.) 50 Broadway (Address.) Trustee (Status.) Grain Lien property (Extent of interest.) [illegible] (Name.) [illegible] (Address.) Creditors (Status.) Unsecured (Extent of interest.)

7. If taxpayer is lessor or lessee, attach copy of lease or full digest of its terms, particularly date effective, date of expiration, and royalty rates If preceded by an option, give full digest of its terms .....

8. Manner of acquisition (purchase, exchange, gift, etc.) Purchase 9. Date acquired Underwood & Plant Aug 1917 El Carlota Sept 1922

INORGANIC NONMETALLIC MINERAL PROPERTIES

The data indicated in these schedules should be furnished separately for each operating unit or each property acquired at a different date. No data already submitted need be duplicated if reference is made to date, form, and place of filing.

Name of Taxpayer OLD MISSION PORTLAND CEMENT CO *Address* 433 Mills Bldg., San Francisco

The inorganic nonmetallic minerals include abrasives, asbestos, asphalt (natural), barytes, cement rock, clay (all varieties), feldspar, fertilizers (natural), fluorspar, fuller's earth, graphite, gravel, gypsum, limestone, lithia minerals, magnesite, marl, mica, mineral paints, peat, potash, precious stones, refractories, [illegible], silt, sand (common building, fire, core, molding, engine, glass, etc.), silica, slate, soapstone, soda, stone (building, crushed, pulp, etc.), sulphur, talc and related [illegible].

If you own or operate a deposit containing mineral of this character and claim a value for same or deduct depletion, this schedule is applicable to your case and must be submitted. If you (a) purchase your raw mineral materials, or (b) do not capitalize nor deplete mineral values, this form should be returned, with a sworn notation specifying which of these facts renders it inapplicable to your case.

Depletion implies "a limited quantity of a valuable substance," the removal of which reduces the value of the property. Therefore, if you claim a value for mineral in addition to the surface value of the land for other purposes, it is necessary that you substantiate such value to the satisfaction of the Commissioner and establish the number of tons or other units contained in the deposit.

SCHEDULE I—COST OF PROPERTY

It is essential that this schedule be completely filled out in all cases notwithstanding valuation is claimed as of another basic date.

1. Name of mine, quarry, etc. Underwood Flint and El Cubilan 2. Location and legal description of property Sec San Juan San Benito County California

3. What mineral or minerals do you own or produce? Limestone and Shale

4. What method of recovery is employed (surface removal, underground mining, open pits, quarry, drilled wells, dredging, etc.)? Quarrying

5. Taxpayer's status: Fee owner {Yes/No} ..... Operator {Yes/No} Yes Lessor {Yes/No} No Lessee {Yes/No} Yes Extent of interest .....

6. Others interested: (a) Judge E. B. Pearce (Name.) San Juan (Address.) San Benito County (Status.) California (Extent of interest.)

(b) Mr Funk (Name.) 500 acres (Address.) Town (Status.) San Juan (Extent of interest.) property (Name.) on an (Address.) emergency (Status.) (Extent of interest.)

7. If taxpayer is lessee or lessee, attach copy of lease or full digest of its terms, particularly date effective, date of expiration, and royalty rates. If preceded by an option, give full digest of its terms .....

8. Manner of acquisition (purchase, exchange, gift, etc.) Purchase 9. Date acquired Underwood & Flint Aug 1917 El Cubilan Sept 1918

10. (a) Amount paid in cash $ None (b) To whom paid ..... (Name.) (Address.) (Amount paid.)

11. (a) Amount paid in stock, par value $225,000. (b) Cash value of stock on date paid $..... (c) To whom paid Stockholders Corporation San Juan Port Cem Co 175000 (Name.) (Address.) (Cash value paid.) Individuals 50000

12. (a) Nature and cash value of other considerations (bonds, etc.); ..... (b) To whom paid ..... (Name.) (Address.) (Par value paid.)

13. How were the cash value of stock and other considerations established? .....

Append a copy or digest of the report or detailed computation by which the cash value was determined. No appraisal which is merely an expression of opinion or reduction of book value or par value of stock or bonds will be accepted as evidence of value. (See Article 206, Regulations 62.)

14. Total cash value of all considerations paid, $..... Was this value fixed by a bona fide sale by which the property passed to an owner in fact as well as in form different from the vendor? ..... (No fictitious or inflated sale price will be accepted as a valuation for depletion.)

15. Distribute the purchase price between the items enumerated below which apply to this transaction. If deposit has been purchased in separate parcels at different times enter each separately on additional schedules.

ITEM.	NUMBER OF ACRES.	PRICE PER ACRE.	TOTAL.	REMARKS.
Surface (fee) not containing mineral	160	$ 300 00	$ 48000.00	
Surface (fee) containing mineral	1293	$35 00	1079651.10	
Mineral (fee)				
Mineral rights	8750	$7.15	500000.00	See letter attached
Leasehold				
Plant			5x51x6.90	
Equipment				
Development & Organization			7,000.00	
Other assets (itemize) Canals	1010	7x35	75000.00	
TOTAL				

U. S. BOARD OF TAX APPEALS DIV. DOCKET 38853 EXHIBIT B RESPONDENT'S

SCHEDULE II—VALUATION FOR DEPLETION

Any method of valuation may be used which is generally recognized in the industry. If values assigned in this schedule differ materially from cost, the methods used in arriving at the same must be fully and completely set out so that the data and computation may be checked. The taxpayer should fix the value of his own property and substantiate the value assigned, to the satisfaction of the Commissioner of Internal Revenue. So-called appraisals that are mere expressions of opinion will not be accepted as evidence of value. A report by an engineer is necessary if operations are extensive. (Attach as Exhibit A.)

1. State the value assigned to entire property as of March 1, 1913, if acquired prior to that date, $..... (See Article 206, Regulations 62.)

(a) Divided among the items applicable enumerated below:

ITEM.	NUMBER OF ACRES.	VALUE PER ACRE.	VALUE.	REMARKS.
Surface (fee) not containing mineral		$	$	
Surface (fee) containing mineral	1293		103x398.10	See letter attached
Mineral (fee)				
Mineral rights	8750		500000.00	
Leasehold				
Plant				
Equipment				
Development				
TOTAL				

U. S. BOARD OF TAX APPEALS DIV. DOCKET 38853 ADMITTED IN EVIDENCE FEB 7 - 1931 EXHIBIT B RESPONDENT'S

2—10824

(b) Number of tons (long or short), pounds, cubic yards (or cubic feet), brick, squares, barrels or other units of mineral remaining in the deposit at date of valuation.....

Estimated remainder of tonnage commercially useful to us on Dec 31/1921 7726[illegible] tons
(State unit and mineral.)

(c) VALUE PER UNIT IN PLACE, $ 20 Cents a ton
(State unit and mineral.)

2. State what method was used to determine the number of units contained in the deposit. If estimated, state basis. If made by an engineer, attach copy of report.....

Estimated tonnage required by Cement Co over a period of 40 years

3. If you purchased the mineral-bearing land on an acreage basis what will be its probable residual value after the mineral is removed? .....

4. If you market the material in its natural state without treating or manufacturing into a finished product, what was your profit per ton or other unit for the period 1911 to 1914, inclusive, giving detailed costs and selling price? .....

5. Prepare simple sketch map showing total acreage, mineral lands, boundaries, near-by towns, railroads, rivers, and other features. (Attach as Exhibit B.)

TABLE OF PRODUCTION

YEAR.	OPERATOR. Units Produced [illegible] (State unit.) On fee lands.	On leaseholds.	LESSOR. Units mined.	Royalty per unit.	DEPLETION DEDUCTED. On income tax returns.	On books.
Total quantity mined prior to March 1, 1913						Arbitrary - we ask for valuation years January 1/1922
1913 (after March 1)						
1914 1918	12538				2797.80	2797.80
1915 1919	52697				5269.20	5269.20
1916 1920	84[illegible]0.60	16718.60			10112.30	10112.30
1917 1921	109613.[illegible]	33375			14298.91	14298.91
1918	279203.60	50093.60			32498.01	being 10¢ a ton except on 487 tons left in bunkers by Plant Contractors after first run April 1918
1919 TOTAL	329297.[illegible]					
1920						

SCHEDULE III—DEPRECIATION

With respect to each operating unit on which there is physical property mentioned in the return under consideration, give the following facts:

1. Designation of operating unit Cement Plant

2. Value of physical properties as of March 1, 1913, or their cost, if acquired subsequent to that date 886721.14

3. Fill out the following table, or one similar, with respect to each property or operating unit on which depreciation is claimed.

DATA DESIRED.	Mar. 1, 1913.	1914	1915	1916	1917	1918	1919	1920
(a) Capital sum returnable through depreciation at beginning of each year (based on March 1, 1913, values)								
(b) Capital returnable through depreciation added during each year	See letter and attached Exhibit							
(c) Amount of depreciation sustained during each year								

The information called for in (b) and (c) of above table must be itemized to indicate amounts and rate of depreciation for plant and equipment of different types, such as buildings (describe construction), mills, machinery, railways, cars, excavators, steam shovels, etc. (Attach as Exhibit C.)

JURAT

I swear (or affirm) that the answers to the questions herein, including statements and figures entered in the accompanying schedules and in any additional statements and schedules attached hereto, are, to my best knowledge and belief, complete, true, and correct in each and every particular.

Sworn to and subscribed before me this ..... day of ..... (Month.) ..... (Year.)

(Signature of individual or agent.)

[SEAL.]

(Signature.)

(Title.)

We, the undersigned, general officers of OLD MISSION PORTLAND CEMENT CO.
(Name of corporation, partnership, or association.)

being severally duly sworn, each for himself deposes and says that the answers to the questions herein, including statements and figures entered in the accompanying schedules and in any additional statements and schedules attached hereto, are, to his best knowledge and belief, complete, true, and correct in each and every particular.

[illegible] (Signature; state title.)
Vice President (Signature; state title.)

Sworn to and subscribed before me this 19th day of December 1922
(Month.) (Year.)

[SEAL.]

H. Prescott (Signature.)
Asst Secretary (Title.)

Your completed report on this form should reach the office of the Commissioner of Internal Revenue, Washington, D. C., on or before ..... 192 , unless an extension of time is granted.

a 2

EXHIBIT B

(Received Dec 28
1922 Natural
Resources Division)

OLD MISSION PORTLAND CEMENT COMPANY

Manufacturers of
High Grade Portland Cement
San Francisco

December 19th, 1922.

IT:NR:NM:C.C.G.

Form F—Depletion and Depreciation

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:—

Attached is Form F, filled in to the best of our ability, made up from the accounts and such other information as we have on file. The delay in making this return was due to the fact that this Company, incorporated in 1912, was re-organized in July 1916 with an entire change of officers, and the records of our predecessors were not sufficiently complete to enable us to determine either the cash value of the stock paid for the properties, or the mineral contents of the deposits. We have a number of reports from Engineers—1906 to 1912, but these were evidently used for promotion purposes and do not reflect the tonnage available for commercial use—moreover, there is such a wide variation in the estimates that they are of no value for the purpose of this return.

Upon the suggestion of your field representative, Mr. Keenan, we are submitting a brief history of the Company, with other facts that may be of service in your efforts to determine a just basis for depletion and depreciation.

The Old Mission Portland Cement Company was incorporated on February 10, 1912, and on August 7th of the same year took over from the Bondholders' Committee of the San Juan Portland Cement Company, certain lands and the uncompleted Cement Plant of that Company for 175,000 shares of Common Stock—par value, $10.00 per share. The "lands" included in the transaction were:

Plant Site		160
Chittenden Ranch		1010
Underwood Deposit	85	
Barbee Deposit	696	
Flint Deposit	512	1293
The Old Mission Company became "Fee Owner" of:		2463 Acres

[303]

The Company was unsuccessful in its efforts to raise capital until the re-organization of 1916. The present interests then took control, completed the Mill, and commenced to operate on May 1, 1918. Under the re-organization plan the Bondholders' Committee surrendered 25,000 shares to be applied as part payment for the work of putting up the Plant. The other 150,000 shares were placed in trust for three years for the purpose of transferring control to the new administration.

In the Dissolution of this trust and the apportionment of the 150,000 shares to the individual bondholders we discovered that in total the members of the Committee had turned in $1,186,334. par value of the San Juan Portland Cement Company Bonds, and in addition had paid $20,700. for the properties at Sheriff's Sale, for all of which, as previously stated, they received 175,000 shares of Old Mission Stock. We have no means of ascertaining the cash value of the bonds surrendered, but the book entries covering the transfer of the aforementioned properties are:

Lands	1,202,653.10
Uncompleted Cement Plant	545,346.90
Organization and Development	2,000.00
	$1,750,000.00

The Underwood property has been practically depleted of lime rock since early in 1920, but still contains sufficient clay to supply the Mill at its present capacity for a number of years. Both lime rock and clay are necessary to the manufacture of Portland Cement.

The Barbee property contains no high grade limestone but considerable clay similar to that of Underwood.

The Flint property is now supplying the lime rock used at the Plant. From development work done in 1918 the available tonnage was estimated as sufficient to run the Mill for eight years. We started to use the material in March 1921, but from present indications it would seem that the supply will be exhausted in another five years—that is in say, 6½ years from March 1921.

From March 1920, when Underwood was exhausted until March 1921 when arrangements were completed to enable us to draw upon Flint, lime rock was obtained from the property of Judge E. A. Pearce of San Juan.

For the Purpose of Depletion the Plant Site acreage which we estimate to be worth $48,000. may be eliminated. The Chittenden Ranch, eight miles from the Plant, was bought principally for the Clay beds and Oil prospects. The Clay is unnecessary, as equally good material can be obtained from Underwood and Barbee, which are much nearer the Mill; and, concerning the Oil, nothing has been done so far to prove its existence. We suggest, therefore, that the Ranch be also omitted in computing the cost of mineral lands until we begin to draw upon its resources. Our estimate of its value for agricultural purposes is $75,000. which includes the buildings. [304]

The cost therefore of the mineral lands bought on August 7th, 1912 would be:

Land		1202653.10
Less:		
Plant Site	48000.	
Chittenden Ranch	75000.	123000.00
		1079653.10

The Company commenced to quarry for Rock and Shale in April 1918, and commenced Mill Operation on May 1st of the same year. The output to December 31st, 1912 has been:

	Tons
Underwood and Vicinity	203586.81
E. A. Pearce—on royalty basis	50093.50
Flint	75656.81
	329337.12
The estimated life of Flint is:	6½ years
We commenced to take out Rock in March, 1921, which gives an elapsed time to Dec. 31, 1921:	¾ years
Leaving probable life from	5¾ years
During this period of 5¾ years the Mill will require, at its present capacity, Rock and Shale:	1035000.00
	1364337.12
Deduct Rock taken from Pearce property	50093.50
Estimated Commercial tonnage	1314243.62
If we figure the residual value of the land @ $35.00 per acre we get:	
Rock Cost less Plant Site and Ranch	1079653.10
1293 acres @ $35.00 per acre	45255.00
	$1034398.10

which divided by 1,314,244 tons gives a depletion rate of nearly 79 cents a ton.

On September 23, 1912, the Company purchased the mineral rights to 8750 acres on the El Gabilan Rancho for 50,000 shares of Common Stock. This land is about three miles beyond the Flint property in a mountainous district inaccessible except by pack

mule and of no use for Cement making purposes until a suitable means of transportation has been provided. Work is now being done with a view to estimating the useful tonnage available, and we hope to find sufficient rock to meet the Company's requirements for the remainder of its corporate life.

The Company will either have to go to Gabilan within the next few years, purchase new deposits, or go out of business. The question is whether [305] depletion is to be figured only on the deposits bought in August 1912 or whether we should endeavor to reach a rate that would cover the Gabilan deposits also.

If the Company goes to Gabilan, as in all probability it will, we would suggest that we allow for 25% increase in the capacity of the Mill, and figure depletion over an assumed corporate life of 40 years from May 1st, 1918. Under these conditions, we would get a tonnage of:

	Tons
Commercial tonnage from original purchase to Sept. 30th, 1927 as shown above:	1314244
Allowing for an increase of 25% in production, the Rock and Shale required from Sept. 1927 to April 30th, 1958, would be 220,000 tons a year. 220,000 tons x 30 years and 7 months:	6728333
Estimated total tonnage required during 40 years from May 1st, 1918:	8042577

We make no attempt to forecast the value of the Gabilan mineral rights after 40 years—there is the possibility that substitute for Portland Cement may be developed, or that something else may arise to depreciate its value.

If the depletion rate be based on the cost of the entire deposits spread over a life of 40 years, we get:

Cost of original properties less Plant Site	
Ranch and residual value	1034398.10
Gabilan Mineral Rights	500000.00
	1534398.10

which divided by the commercial tonnage required, viz: 8,043,577 gives a rate of over 19 cents per ton.

Should the Company decide that it would not go to Gabilan, a rate of 79 cents per ton would have to be applied to write off the original quarry lands by September 1927. Should the Commission decide that this figure is too much to allow under the heading of Depletion, the Company will have to adjust the difference in some other way.

In sizing up the general situation we have reached a conclusion that the rate taken over the entire deposits should be about 20 cents a ton. We submit this figure for your consideration, and would be glad to receive your opinion as early as possible, that we may make whatever adjustments are necessary before closing the books. [306]

DEPRECIATION

Unfortunately we have only lump sum prices on the Mill and Equipment— a large part of the Machinery was included in the properties purchased from the Bondholders' Committee of the San Juan Portland Cement Company by the issuance of Capital Stock, and the Plant was completed by the builders at a contract price. A few changes and additions have since been made by ourselves.

The Mill started operation on May 1st, 1918. Since then we have been using a 5% per annum blanket depreciation upon the monthly balances of the Plant —and 10% per annum on furniture. Production during the first three years was comparatively small, in 1921 we reached 70 per cent of capacity, and during the current year we have been working to full capacity. We believe that with a Plant such as ours, which is running day and night, 5% depreciation is insufficient, and now that we are on a full capacity basis, consider that an increase to 10% would be justified.

Any further information that may be required we will be glad to furnish so far as is possible.

Very truly yours,

OLD MISSION PORTLAND CEMENT COMPANY,

(Signed) H. PROBERT,

HP:NS Assistant Secretary. [307]

EXHIBIT B

OLD MISSION
(Schedu

PL

	March 1 1913	1914	191
Capital sum returnable through depreciation at beginning of each year	585,721.14	603,781.89	603,81
Additions each year	18,060.75	32.73	1,33
	603,781.89	603,814.62	605,15
Reserve for depreciation each year			

FURNITURE

	March 1 1913	1914	191
Capital sum returnable through depreciation at beginning of each year		1,102.95	1,10
Additions each year			
		1,102.95	1,10
Reserve for depreciation each year			

	Proof
Ledger Balances Dec. 31, 1921	
Plant and Equipment	1,211,077.41
Furniture	4,805.15
	1,215,882.56
Reserve for Depreciation	173,208.48
Net balance Dec. 31, 1921	1,042,674.08

(Schedule 3 Depreciation Exhibit C)

PLANT AND EQUIPMENT

	March 1 1913	1914	1915	1916	1917	1918	1919	1920	1921	1922
um returnable through de-										
on at beginning of each year	585,721.14	603,781.89	603,814.62	605,151.46	607,257.75	597,507.75	909,033.98	826,924.31	920,242.82	1039,448.92
each year	18,060.75	32.73	1,336.84	2,106.29	(9,750)	342,561.89	(39,437.87)	139,036.47	171,409.17	
	603,781.89	603,814.62	605,151.46	607,257.75	597,507.75	940,069.64	869,596.11	965,960.78	1091,651.99	
or depreciation each year						31,035.66	42,671.80	45,717.96	52,203.07	
						909,033.98	826,924.31	920,242.82	1039,448.92	

FURNITURE

	March 1 1913	1914	1915	1916	1917	1918	1919	1920	1921	1922
um returnable through de-										
on at beginning of each year		1,102.95	1,102.95	1,102.95	1,596.13	2,203.31	3,183.62	3,374.60	3,568.84	3,225.16
each year				493.18	607.18	1,334.04	575.47	568.00	124.33	
		1,102.95	1,102.95	1,596.13	2,203.31	3,537.35	3,759.09	3,942.60	3,693.17	
or depreciation each year						353.73	384.49	373.76	468.01	
						3,183.62	3,374.60	3,568.84	3,225.16	

	Proof
r Balances Dec. 31, 1921	
nt and Equipment	1,211,077.41
niture	4,805.15
	1,215,882.56
erve for Depreciation	173,208.48
balance Dec. 31, 1921	1,042,674.08

As shown above

Plant and Equipment Jan. 1, 1922	1,039,448.92
Furniture	3,225.16
	1,042,674.08

[308]

Entered SET 303 V.

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE,
Form 47—Revised April, 1918.
Ed. 300,000.

CLAIM FOR ABATEMENT
TAXES ERRONEOUSLY OR ILLEGALLY ASSESSED

DATE OF FILING TO BE RECEIVED
MAY 28 1918
U. S. INT. REV. 1ST CAL.
PLAINLY STAMPED HERE

State of California
City and County of San Francisco } ss:

IMPORTANT
This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

U. S. BOARD OF TAX APPEALS
DOCKET 38850
Write Name as it is to be printed in Evidence
FEB 7 - 1931
PETITIONER'S EXHIBIT V 432
RESPONDENT'S

I, OLD MISSION PORTLAND CEMENT COMPANY
(Name of claimant.)
of 432 MILLS BUILDING San Francisco California
(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Manufacture & Sale of Cement
2. Character of assessment or tax Capital Stock Tax
3. Amount of assessment Fifteen hundred & thirty seven ——— $1537.00/100
4. Amount now asked to be abated Fifteen hundred & thirty seven $1537.00/100

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

Value of Capital Stock does not warrant the Tax
See following copies of Correspondence between Washington and this Office
Attached hereto
March 21/18 From Treasury Dept calling for Statement of Assets & Liabilities
Apl 2/18 Our reply submitting Same
Apl 10/18 Treasury Dept imposes assessment $1537.00
Apl 26/18 Our letter submitting additional information and requesting re-consideration

Sworn to and subscribed before me this 28th day of May 1918
(Title)

Signed:
OLD MISSION PORTLAND CEMENT COMPANY
Write Name as it is to be Printed
H. Probst
Assistant Secretary

(This claim may be sworn to before a Deputy Collector of Internal Revenue without charge.)

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

NAME AND ADDRESS.	CHARACTER OF ASSESSMENT OR ARTICLE TAXED.	PERIOD COVERED BY ASSESSMENT.	LIST.	YEAR.	MONTH.	PAGE.	LINE.	AMOUNT.
Old Mission Portland Cement Co.	Addl Cap	12 Mos	28 Cap	1918	Mch.	6	8	1537.00
432 Mills Bldg. S.F.	Stock Tax	6/20/18	Stock					
					Stamp not collected January 28, 1919			

Assessment Clerk, Internal Revenue Bureau.

Form 47

Statement Order No. 147

District First

Add'l Capital Stock Assessment.
(Nature of tax.)

Claimant Old Mission Portland Cement Co.,

Address 432 Mills Bldg. San Francisco, California

Examined and submitted for action Jan. 29, 1919.

Amount claimed, $1,537.00

Amount allowed, $1,349.00

Amount rejected, $188.00

Chas A Drake
Acting Head C. S. T. Div.

Chief of Division.

EXHIBIT V
COPY
TREASURY DEPARTMENT

Office of
Commissioner of Internal Revenue

Washington, March 27, 1918.

Address reply to
Commissioner of Internal Revenue
and refer to
CST—OLB—1st Cal.
Old Mission Portland Cement Co.,
432 Mills Building,
San Francisco, Cal.
Sirs:

Re—Fair value of capital stock for purpose of capital stock tax for taxable period ending June 30, 1918.

You are advised that this office desires additional information before accepting as the fair average value of your capital stock the amount shown by you in your return, Form 707.

Please submit statement of assets and liabilities of your company as of June 30, 1917 or as of the close of your fiscal year ended on the nearest earlier date. In the event that such statement as taken from your books of account does not reflect the actual value of your capital stock will you please furnish a supplemental statement that will reflect a true valuation. This additional statement, if necessary should be supported by a full explanation of the difference between it and the statement as taken [311] from

your books and should be in the form of an affidavit duly attested.

Respectfully,

(Signed) M. F. WEST,
Acting Deputy Commissioner.

ET [312]

432 Mills Building,
San Francisco, Cal.,
April 2nd, 1918.

Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

Sir:

In reply to your letter March 27th CST-OLB-1st Cal., we submit statement of Assets and Liabilities taken from the books of this Company as at June 30th, 1917.

Assets

Real Property		$1,702,653.10	
Construction work in progress		724,517.58	
Furniture and Fixtures		2,094.66	$2,429,265.34
Cash at bank and on hand		81,958.23	
Notes Receivable		25,832.11	
Accounts Receivable		41,954.99	149,745.33
Warehouse Supplies			1,919.34
	Total Assets		$2,580,930.01
Preliminary and Development Expense			
Bond Discount	$101,415.47		
Stock Discount	853,850.00		
Commission on Stock and Bond sales	42,030.00	997,295.47	

Organization Expense, Bond Interest, Legal, Engineers' fees, Travelling, Office rent, Salaries, etc.	100,527.28		
Less rentals, interest and miscellaneous receipts	10,665.07	89,862.21	1,087,157.68
			$3,668,087.69
			[313]
Liabilities			
Bonds issued and outstanding			395,000.00
Bond interest accrued and unpaid			7,425.00
Creditors (Construction contract)		85,373.24	
Creditors (Sundry)		6,599.45	91,972.69
			494,397.69
Capital Stock issued and outstanding			3,173,690.00
			$3,668,087.69

The Notes and Accounts Receivable are largely for advances to the California Central Railroad Company which owns a tap line to the Plant of the Old Mission Portland Cement Company. The road was seriously damaged by floods in 1914 and operation was suspended. The Old Mission Portland Cement Company at that time was in financial difficulty and unable to complete its plant, but since the necessary funds have been provided the railroad has become a necessity, and money was loaned by the Cement Company for the purpose of rehabilitating the line.

We trust this gives the information desired.

Respectfully,

OLD MISSION PORTLAND CEMENT COMPANY.

HP/R [314]

TREASURY DEPARTMENT

Washington, April 20, 1918.

Office of

Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
E-Capital Stock Tax - OLB-1 Cal.
In re: Tax Liability.
Old Mission Portland Cement Co.,
432 Mills Building,
San Francisco, Cal.
Sirs:

Receipt is acknowledged of your recent communication explaining the fair value of the stock of the OLD MISSION PORTLAND CEMENT COMPANY, estimated on the return of capital stock tax, Form 707, filed with the Collector of Internal Revenue, 1st district of Cal. on, July 27th, 1917, as nothing per share.

In reply you are advised that the statements contained in your letter have been carefully considered, but in view of the assets exceeding the liabilities by $3,173,690.00, as shown by an analysis of the statement forwarded with your letter, the fair value of your stock is estimated at not less than $10.00 per share.

An assessment of capital stock tax in the amount of $1,537.00 will, therefore, be made against the company on the next assessment list. The Collector will forward you a bill for the tax due and payment should be made direct to him within ten days after the mailing thereof by the Collector.

Respectfully,
(Signed) M. F. WEST
Acting Deputy Commissioner.

CCH [315]

432 Mills Building,
San Francisco, Cal.
April 30th, 1918.

Commissioner of Internal Revenue,
Treasury Department,
Washington, D. C.

Sir: Capital Stock Tax - OLB 1 Cal.

With further reference to your letter of April 20th and to our acknowledgment of April 29th, we now submit the following information regarding the finances of the Company.

Balance sheet of June 30th, 1917 shows

Assets	$2,580,930.01
Less Liabilities	494,397.69
	$2,086,532.32
Capital Stock Issued	3,173,690.00

consequently, on the book showing, the stock is worth 65.7% of par, or $6.57 per share.

We consider that this figure is out of all proportion to the true value inasmuch as investigation made since July 25th, 1916—on which date the present administration assumed control—has disclosed the following facts:

1. The real property and the uncompleted plant of the San Juan Portland Cement Company were acquired at Sheriff's Sale for $20,700 and turned over to the Old Mission Portland Cement Company in August, 1912, for $1,750,000 stock at par. Subsequently mineral rights on additional land were purchased for $500,000 stock at par, making a total

of $2,250,000 stock issued for the properties.

2. Between 1912 and 1916 many unsuccessful attempts were made to finance the Company and to complete the mill. In spite of the many inducements offered in the form of Stock and Bond Discount and Commission to financial agents, the actual cash received amounted to $123,800.31 only—which was expended as under:

Construction Equipment and Warehouse Supplies	$ 64,933.14	
Interest, Taxes, Salaries and Expenses	87,521.14	
	$152,454.28	
Less unpaid bills	28,653.97	$123,800.31

3. In July 1916, the present interests agreed to furnish the money to complete the mill and place it in operation, on condition that they should receive $1,000,000 par value of Stock as a bonus with bonds purchased for cash. [316]

4. Stock was delivered and charged to Stock Discount account as the bonds were sold, but no stock was sold for cash after the reorganization.

5. In June 1917 Stock Discount stood at $853,-850.00 of which $178,850 was charged during the earlier administration.

6. The actual cash investment to June 30, 1917 was

Properties purchased at Sheriff's Sale	$20,700.00

Construction, etc., Sec. 2 above, say	64,933.14	
Advanced by new interests	205,500.00	$291,133.14
and Stock was issued in 1913 for additional mineral rights $500,000 at par, cash value doubtful, but say		150,000.00
		$441,133.14

Our contentions are:

That the full amount of preliminary and development expense shown in our letter of April 2nd is not an asset, but a deferred charge to Profit and Loss to be written off over a period of years;

That the book figures are undoubtedly much inflated and do not represent a fair value—as is shown by the fact that the actual total cash investment to June 30, 1917 is figured at less than the liabilities of the same date;

That the mill is not yet producing, and as we are unable to forecast the future, the stock value is prospective only.

We shall be glad to answer any questions that may occur to you in connection with this matter.

Yours very truly,

OLD MISSION PORTLAND CEMENT COMPANY

HP/R

[317]

Exhibit W.

OLD MISSION PORTLAND CEMENT COMPANY

Manufacturers of
High Grade Portland Cement
San Francisco
No. 1

July 21st, 1924
In reply please
refer to file
B-HP

Mr. R. M. Estes,
Deputy Commissioner,
Internal Revenue Dept.,
Washington, D. C.

(Internal Revenue,
Capitol Stock Tax Div.,
July 26, 1924)

Dear Sir: MT CST-1 Calif - 6726 - JH

We have reviewed our file in connection with the capital stock tax return for the period ending June 30th, 1924, and can see no reason for changing the figures submitted.

The entire plant and land value as a going concern in our opinion can only be based on raw materials actually available. It is true that the Company has earned reasonable profits from its available raw material during the past two or three years, and it is to be hoped that similar good fortune will attend us until the quarries are depleted. When the quarries are exhausted we have nothing but the scrap value of the plant, and whatever the book surplus may be at that time. The equipment itself would not find a ready sale because it is antiquated. Most of it was bought by the San Juan Portland Cement

Company between 1907 and 1912, but as neither the San Juan Portland Cement Company nor the Old Mission Portland Cement Company was in a position to finance the erection of the mill until 1916, the machinery lay around subject to weather exposure for several years.

No dividends have ever been paid on common stock. Whatever cash surplus may accrue to the time of depletion of the present quarries will be utilized to develop the main deposits and to modernize the plant,—or it will be distributed to stockholders should the Company decide to close down.

Surplus at the end of 1922 was	$48,513.00
Assume net profit of $275,000.00 per annum to September 30th, 1927	1,301,487.00
	1,350,000.00
Add extra value of Chittenden Ranch	50,000.00
	$1,400,000.00

[318]

July 21st, 1924.

Mr. R. M. Estes, Cont'd

It would seem then that we might expect an accrual of $1,400,000.00 during the period January 1, 1922 to September 30, 1927, an equivalent of say $243,500.00 a year, and which in the event of dissolution would be all the common stockholders would receive. In our opinion, leaving out all future consideration as to whether or not we will develop the other quarry, this sum is an indication of the fair

value at this time.

We have no desire to distort or depreciate the value, but as an endorsement of our own judgment we have ascertained that blocks of stock, 42,655 shares, 13,667 shares and 6,876 shares, have recently changed hands at from 75¢ to $2.00 per share. The largest and smallest of these blocks were held by interests who have been connected with the Company almost from its inception. The lot of 13,667 shares was held by men long familiar with the cement business, who kept themselves fully informed as to developments, and the conditions surrounding the operations of this Company, and who sold their stock after being furnished with our financial statement of December 31st, 1923.

Under the circumstances related above we respectfully ask that you will modify the assessment.

Yours very truly,

OLD MISSION PORTLAND CEMENT COMPANY

HP:FS (Signed) H. Probert

Assistant Secretary [319]

Exhibit X.

OLD MISSION PORTLAND CEMENT COMPANY

Manufacturers of
High Grade Portland Cement
San Francisco

September 4th, 1924

Mr. R. M. Estes,
Deputy Commissioner,
Internal Revenue Department,
Washington, D. C.

(Internal Revenue,
Capitol Stock Tax Div.,
Sept. 9, 1924)

Dear Sir;— MT CET-1 Calif-6726-JH

Your letter of August 8th was received by the undersigned upon his return to the office yesterday after an absence of some weeks. Evidently there has been a misunderstanding in regard to the figures submitted in our letter of July 21st. The amount of $1,400,000. was not intended to represent the fair value of this Company's stock as at December 31, 1922—which was the date to which our return for the taxable year ending June 30, 1924—was computed. It was merely an estimate of what the stockholders might expect to receive in the event of dissolution when the present quarries are exhausted in September 1927. If you will refer to our computation you will see that the figure of $1,400,000. includes $1,301,487. for profits not yet earned, and which should not be added to the fair value at this time.

Our apportionment of fair value through the period would have been $243,500. as at December 31, 1922 increasing year by year until the figure of $1,400,000. was reached in September 1927.

We believe our claim to be based on sound reasoning, but in view of later developments, viz: in the stability of the market and reduced operative costs, unforeseen when the original return was filed, we submit the following as a modification of the fair value at December 31, 1922:

13563 shares of Preferred @ 8.75 per share	$118676.
This stock was issued for cash @ 8.75 with a bonus of one share of Common to 4 shares of Preferred	
334206 ¾ shares of Common - average value 1.25	417759.
Similar stock was marketed in 1924 at from 75¢ to 2.00	$536435.

[320]

The Directors would be willing to accept an assessment of $536,435. for the taxable period ended June 30, 1924, and ask that the amount of $1,400,000. shown in your letter of August 8th be changed accordingly.

Very truly yours,
OLD MISSION PORTLAND CEMENT COMPANY,
(Signed) H. Probert
Assistant Secretary [321]

HP/NS

Exhibit Y.

OLD MISSION PORTLAND CEMENT COMPANY

Manufacturers of
High Grade Portland Cement
San Francisco

June 6th, 1924
In reply please
refer to file
B-HP

Mr. R. M. Estes,
Deputy Commissioner,
Internal Revenue Department,
Washington, D. C.

(Internal Revenue,
Capitol Stock Div.,
June 11, 1924)

Dear Sir:

We acknowledge receipt of your letter undated—file M.T.-CST-1 Calif.-6726 - JH - returning check for $52.13. We fail to see why "it is apparent that the value of Real Estate, etc., as shown by the 'Books of Account' column more nearly reflects the fair value than the figures reported by us". We thought this matter was fully explained in our letter of June 24th, 1921, after the investigation made by your field representative Mr. Holt.

We certainly cannot permit you to enter the Real Estate at $1,704,328.10 without protest. This property, including certain machinery, but excluding additional mineral rights to which we will refer later, was purchased at sheriff's sale for $20,700.00 and turned over to the Old Mission Portland Cement Company in 1912 for $1,750,000.00 of stock at par.

In 1913, mineral rights only, were obtained to 8570 acres on El Gabilan for $500,000.00 stock at par.

Except for the ranch at Chittenden which is valued at about $50,000.00, and 160 acres constituting the plant site, the land is of little value for anything but cement making purposes. One of the quarries, Underwood, was practically exhausted in 1920, and it is expected that those now in operation will be exhausted for commercial purposes about September 1927. All that will then remain will be our reserves at Gabilan which are situated in a mountainous country seven miles from the mill, inaccessible at present except by rough trails. It is evident then that by September 1927, the plant site and Chittenden ranch will be the sole remaining value of the original lands and equipment for which the Company paid $1,750,000.00 in Common Stock.

Lack of working capital has prevented the earlier development of the Gabilan deposits, and it is estimated that $300,000.00 will have to be expended in providing means of transportation before they are available for use. [322]

June 6th, 1924

A new mill is being built on San Francisco Bay at a reported cost of several million dollars, to manufacture cement from shell deposits. This mill will be very advantageously located with respect to delivery to the Bay regions, which is one of the most important distributing and consuming districts in the whole State. It will have a large freight differential in its favor against the other mills, and in addition will be able to make deliveries by barge at all

important points on the Bay, at a great saving in freight and handling over other mills serving the same territory. Located on its own deposits and with the wet process, no doubt the mill will have very low costs. It will have a great advantage in fuel oil, the location permitting deliveries by barge or tanker, and as perhaps you are aware, next to the labor cost fuel oil is the largest item in the cost of manufacturing portland cement in California.

When these matters are taken into consideration the question arises as to whether it will pay this Company to continue in operation after the present quarries have been depleted. The common stock has always been looked upon as having a prospective value only—no dividends have ever been paid—and since the book value of the lands and equipment was fixed principally by the par value of the common stock issued in exchange therefor, we feel justified in asking that you accept our "fair value" figures.

To the best of our knowledge and belief the highest price at which the common stock of this Company ever changed hands was $2.00 a share, in March 1924. We have recently learned that about 4000 shares were transferred in 1922 at $1.00 a share.

HP:FS

Yours very truly,

OLD MISSION PORTLAND CEMENT COMPANY

(Signed) H. Probert

Assistant Secretary [323]

[Title of Court and Cause.]

DESIGNATION OF RECORD.

To the Clerk of the U. S. Board of Tax Appeals:

Will you please prepare and transmit to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit, duly certified copies of the following documents and records in the above entitled cause in connection with the Petition for Review by said Court heretofore filed by petitioner, namely:

1. The Docket entries of the proceedings before the Board.
2. The pleadings before the Board consisting of:
   (a) The petition filed May 23, 1928,
   (b) The answer filed Jun. 27, 1928,
   (c) The amended petition filed Jan. 26, 1931,
   (d) The answer to the amended petition filed
3. The findings of fact and opinion of the Board promulgated January 21, 1932.
4. The Board's order entered March 2, 1932.
5. The decision of the Board entered April 30, 1932.
6. The petition for review.
7. The statement of evidence as settled by the Board.
8. This praecipe.
9. The orders of the Board enlarging the time for preparation of the record and statement [324] of evidence and transmission of same to the Clerk of the Court, entered December 20, 1932; January 27, 1933; March 13, 1933.

Will you also please forward to the Clerk of the Court, pursuant to the Court's order entered on or

about March 14, 1933, the following original exhibits filed in this case at the hearing, viz:

A	1923 income tax return	3 sheets
C	1912 " " "	3 sheets
D	1913 " " "	3 sheets
E	1914 " " "	3 sheets
F	1915 " " "	3 sheets
G	1916 " " "	3 sheets
H	1917 " " "	3 sheets
I	1918 " " "	12 sheets
J	1919 " " "	9 sheets
K	1920 " " "	11 sheets
L	1921 " " "	20 sheets
M	1922 " " "	22 sheets
N	1925 " " "	16 sheets
O	1926 " " "	16 sheets
P	1924 " " "	13 sheets
Q	Capital Stock Tax Return for year ended June 30, 1917	3 sheets
R	Capital Stock Tax Return for year ended June 30, 1918	5 sheets
S	Capital Stock Tax Return for year ended June 30, 1920	5 sheets
T	1921 Capital Stock Tax Return	5 sheets
U	1922 Capital Stock Tax Return	5 sheets

Original Exhibits to be transmitted to Court upon notice from counsel.

Respectfully,

(Signed) GEO. E. H. GOODNER,
Attorney for Petitioner,
Address: Munsey Building,
Washington, D. C.

[Endorsed]: I hereby accept service of the foregoing designation of record this 25th day of April, 1933.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Apr. 25, 1933. [325]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 325, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of June, 1933.

[Seal] B. D. GAMBLE
Clerk,
United States Board of Tax Appeals. [326]

[Endorsed]: No. 7195. United States Circuit Court of Appeals for the Ninth Circuit. Old Mission Portland Cement Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 19, 1933.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7195

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLD MISSION PORTLAND CEMENT COMPANY, a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a Stated Term, to wit: The October Term A. D. 1932, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-fourth day of July in the year of our Lord one thousand nine hundred and thirty-three.

Present: WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANK H. NORCROSS, District Judge.

No. 7195

In the Matter of the Substitution of Guy T. Helvering, as Commissioner of Internal Revenue in the Place of David Burnet.

Upon consideration of motion of petitioner or petitioners, consented to by respondent or respondents, in each of the following causes, IT IS ORDERED that Guy T. Helvering, as Commissioner of Internal Revenue be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue in each of the following causes, and that each of the following causes, *and that each of the following causes* be so continued and maintained:

* * * * * * * *

OLD MISSION PORTLAND CEMENT CO. vs. COMMISSIONER No. 7195

* * * * * * * *

At a Stated Term, to wit: The October Term A. D. 1933, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the eighteenth day of December in the year of our Lord one thousand nine hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable FRANCIS A. GARRECHT, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

No. 7195

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Geo. E. H. Goodner, counsel for petitioner, and by Miss Helen R. Carloss, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

At a Stated Term, to wit: The October Term A. D. 1933, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twelfth day of March in the year of our Lord one thousand nine hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7195

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typwritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR and GARRECHT, Circuit Judges, and NORCROSS District Judge.

GARRECHT, Circuit Judge:

This is a petition to review the findings of fact, opinion and decision of the United States Board of Tax Appeals, which involved petitioner's income taxes for the years 1923 to 1926 inclusive, and presents for our determination the following questions:

1. Whether the Board's finding that petitioner's limestone properties, known as the Barbee, Underwood and Flint deposits, had a fair market value

as of March 1, 1913, of $63,121, is supported by any substantial evidence.

2. Whether the amortization of bond discount on the bonds of the petitioner's affiliate, the California Central Railroad, held by the petitioner may be deducted in computing the consolidated net income of the affiliated companies for the years 1923 to 1926 inclusive.

3. Whether the petitioner may deduct as business expenses donations to the San Francisco Community Chest, donations to the Y. M. C. A., and an amount paid to a fund to promote a state wide referendum for an increased gasoline sales tax levy in order to provide additional funds for road building.

The Board made findings of fact which may be briefly stated as follows:

The petitioner is a California corporation organized in 1912 for the purpose of engaging in the manufacture of Portland cement. Its capital consists of 350,000 shares of common stock of the par value of $10 per share. It is the successor of the San Juan Portland Cement Company incorporated in 1906, and was organized by bondholders of said company when it defaulted payment of interest upon its bonds in the amount of $1,300,000. At a sheriff's sale the bondholders purchased all of the assets of the company for $20,700.

These assets so acquired included limestone deposits known as the Barbee, Underwood and Flint deposits, about 88 miles south of San Francisco, stocks and bonds of the San Juan Pacific Railway Company

which connected the deposits with the Southern Pacific Railway (a distance of 7 miles), the Chittenden Ranch, and an unfinished cement plant.

Thereafter the bondholders committee organized the California Central Railroad Company and turned over to it the stocks and bonds of the San Juan Pacific Company in exchange for the stocks and bonds of the said California Central Railroad Company.

Thereupon the petitioner was organized and in exchange for 175,000 shares of its common stock of the par value of $10 a share, it acquired from the bondholder's committee the unfinished cement plant, machinery, equipment, etc., which were valued at approximately $500,000 and the lands (2,463 acres) containing the petitioner's deposits. In 1916 the petitioner made the necessary financial arrangements and undertook the completion of its cement plant, which was finished at an additional cost of $500,000, and production started in 1918.

The Barbee deposit was adjacent to the plant; the Underwood and Flint deposits were two and three miles, respectively, from the plant, and were reached by a narrow gauge railroad constructed after 1913 and extended as operations progressed after 1918. The deposits were exhausted in or about 1927.

In its income tax returns for the years 1918, 1919, 1920 and 1921 the petitioner claimed deductions for depletion of mineral deposits at the rate of 10 cents per ton. Upon its income tax returns for the years 1922, 1923, 1924 and 1925 the petitioner

claimed deductions for depletion of mineral deposits at the rate of 20 cents per ton on a valuation of $1,034,398.10 for the deposits on the basis of data furnished in a schedule (Form F) filed December 19, 1922. This schedule indicated that the Underwood deposits had been depleted of lime rock, but not of clay, since 1920; that the Barbee property contained no high-grade limestone but considerable clay; that the Flint property was supplying all the lime rock being used and that it was estimated that it would be exhausted six and one half years from March, 1921, when the plant began using it, although the 1918 estimate had indicated available tonnage for eight years. Between March, 1920, when the Underwood deposit was exhausted, until March, 1921, when the Flint deposit was used, 50,093.50 tons of lime rock were obtained from one E. A. Pearce at 10 cents per ton.

The schedule further showed that the lands had been set up on the books at a valuation of $1,202,653.10, that $48,000 of that amount represented the value of the plant site and $75,000 the value of the Chittenden Ranch for agricultural purposes (the land containing clay not used, but no limestone), and that $45,255 should be deducted as the residual value of the deposit lands, leaving $1,034,398.10 as the value of the deposits. On the basis of a consumption of 329,337.12 tons and a prospective consumption of 1,035,000 tons by the time the Flint deposit was exhausted (less the amount obtained from the Pearce Company) the estimated tonnage to be removed was 1,314,243.62 tons and the division of

$1,034,398.10 by that tonnage would give the depletion rate of 79 cents a ton.

On September 23, 1912, the petitioner had purchased the mineral rights to 8,750 acres on the El Gabilan Rancho for 50,000 shares of common stock and suggested in the schedule that an increase of 25 per cent be allowed in the capacity of the mill; that depletion be figured over an assumed corporate life of 40 years from May 1, 1918, and on such a basis the depletion rate would be over 19 cents per ton. The petitioner therefore adopted the figure of 20 cents a ton.

The Commissioner determined that on March 1, 1913, there were 1,700,000 tons of merchantable limestone in the three said deposits, suitable for the making of Portland cement, and fixed the fair market value thereof on that date at $63,121.00, or 3.713 cents per ton of limestone in place. In computing petitioner's income for the years here involved, depletion deductions were allowed at the rate of 3.713 cents per ton for the limestone removed and consumed in those years as follows:

1923	$8,973.73
1924	7,875.87
1925	9,171.74
1926	9,135.69

Petitioner claims that due to the scarcity on the Pacific Coast of limestone suitable for making Portland cement, the said deposits had a market value on March 1, 1913, far in excess of that allowed by respondent and approved by the Board.

Throughout the years involved in this proceeding, petitioner owned substantially all of the capital stock of the San Juan Pacific Railway Company, a California corporation, and this latter company owned substantially all of the stock of the California Central Railroad Company, a California corporation. Respondent has ruled that the three companies were affiliated for income tax purposes throughout the years involved in this proceeding and there is no controversy over that ruling.

In 1912, the California Central Railroad Company issued its own bonds at a discount, which discount it amortized over the life of the bonds at the rate of $3,381.18 each year. In computing consolidated net income for the years involved here, respondent has allowed deductions in respect of such bond discount, in the amount of $375.99 for the years 1923, 1924 and 1925, and in the amount of $220.79 for the year 1926. He disallowed the balance of the amount of such amortization applicable to the years in question, because those balances were applicable to bonds held in the respective years by petitioner. In other words, respondent recognized the right of the Railroad Company to amortize and deduct that portion of its bond discount applicable to the bonds held by the public, but disallowed as a deduction that portion of the discount applicable to the bonds owned by petitioner.

In each of the years 1923 to 1926, inclusive, petitioner donated $1,000 to the San Francisco Community Chest, this amount being the allotment assigned to the petitioner by the Community Chest

Committee. Publicity through the newspapers and by means of placards on doors was given to such contributions, which petitioner claims resulted in good will and increased business. In 1926 petitioner donated $2,500 to the San Francisco Y. M. C. A., which was then beginning the erection of a new building. The purchase of cement materials for said building was to be allotted to the various cement companies in proportion to their donations. As the result of said donation, petitioner furnished its proportionate share of the material that went into the building. In 1926, petitioner contributed $3,000 to a fund to be used in a State-wide campaign on a referendum to increase the gasoline sales tax in California, in order to provide the State with much needed funds for additional road construction and maintenance over a period of twelve years. The referendum was successful and the State embarked on an extensive road building campaign, using large quantities of cement and cement materials of which petitioner furnished its proportionate share. All of these deductions were disallowed.

In the petition for review the petitioner has made thirty-two assignments of error. No good purpose can be served by enumerating these in detail or in discussing them at length. The opinion will pass upon the points raised, it being sufficient here to say that six of these assignments (1 to 6 inc.) concern six exhibits, the same being petitioner's income tax returns for 1912, 1913, 1914, 1915, 1916 and 1917 introduced by respondent, over the objection

of petitioner. Five of these assignments (7 to 11 inc.) concern petitioner's income tax returns for the years 1918, 1919, 1920, 1921 and 1922, likewise introduced by respondent over petitioner's objection. Five of these assignments (12 to 16 inc.) being petitioner's capital stock tax returns for the years 1917, 1918, 1919, 1920 and 1922 introduced by respondent over petitioner's objection. Another assignment (17) being abatement claim in respect to 1917 capital stock tax assessed against petitioner, likewise admitted in evidence, and three assignments (18 to 20 inc.), being letters from the petitioner, likewise objected to and admitted. Eight assignments of error (21 to 28 inc.) are predicated on alleged error of the Board in its findings as to value of limestone deposits. The remaining assignments of error (30, 31 and 32) are upon the failure of the Board to allow the deductions hereinafter discussed.

The Board of Tax Appeals determined that petitioner's limestone deposits had a fair market value as of March 1, 1913 of $63,121.00. At the hearing before the Board respondent introduced a statement to show how the Commissioner of Internal Revenue arrived at the depletion deductions, which, with the determination by the Commissioner that the amount stated, $63,121.00, was the fair market value of the deposits as of the date named, constituted a prima facie case, which must stand unless overcome by substantial evidence. Nichols v. Commissioner, 44 F. (2d) 157.

It is likewise true that this value was an issue of fact and the finding of the Board of Tax Appeals must be sustained if based upon any substantial evidence. Phillips v. Commissioner, 283 U. S. 589. And this court has held that we are bound by the decision of the Board, where the evidence does not compel a contrary conclusion. Pedder v. Commissioner, 60 F. (2d) 866.

The petitioner produced three expert witnesses who testified at length and gave their opinions as to the value of the property in question as of March 1, 1913. One of these witnesses, who had formerly been connected with the petitioner, but who had no interest at the time of testifying, stated that in his opinion the fair market value as of March 1, 1913 was 82 cents a ton, another expert witness, who at the time of testifying was an official of the petitioner, testified that the fair market value of the deposit of limestone at the date in question was approximately 78 cents, and the other expert, who had no connection with the properties involved in any way, gave the figure of 89.2 cents per ton as a fair value of the date in question. This court has held that "the presumption of correctness is attached to the Commissioner's finding." Matern v. Comm'r., 61 F. (2d) 663. So from the outset the determination by the Commissioner of the fair market value of the property in question was prima facie correct and the burden of establishing it as incorrect was upon the petitioner.

Petitioner insists that because there was no witness to contradict the testimony of its expert wit-

nesses the Board was required to accept it as true. The Board was not bound by the opinion testimony of petitioner's experts. Where the Board itself has experience and knowledge or where there are other facts or any substantial evidence upon which it may predicate a judgment, it may ignore the opinions of expert witnesses. This is particularly true when their testimony as to values was in conflict with other facts disclosed. The weight of the evidence is a matter for the judgment of the Board, and its finding, where supported by any substantial evidence, is conclusive. Had the testimony of these experts stood alone and uncontradicted it might have been sufficient to overcome the presumption of correctness of the Commissioner's findings. However respondent while offering no oral testimony did introduce in evidence certain exhibits, being petitioner's income tax returns for the years 1913 to 1922 inclusive, and the capital stock returns from 1917 to 1922 inclusive, and certain letters of the petitioner.

To the admission of this evidence petitioner objected, but in so far as these documents had a bearing upon the determination of the issue of fair market value, they were admissible, particularly as they tended to contradict the evidence of the expert witnesses, who assumed to base their estimates partially upon their knowledge of subsequent events and the prospective earnings from these cement deposits.

Statements by petitioner in several of these exhibits that none of its stock had ever sold for more

than $2.00 per share, and that some had been exchanged at 75 cents a share, was admissible, because the deposits here involved had been acquired by the petitioner together with the Chittenden Ranch and the incompleted cement plant by exchanging therefor 175,000 shares of its stock. If at the time this stock was valued at the maximum price for which it ever sold, the value of all these assets at the time would have been $350,000. As petitioner valued the machinery and plant alone at $500,000, the Chittenden Ranch at $75,000 for agricultural purposes, and the residual value of the land at $45,255, a valuation of the cement deposits at $63,121 could not be considered unwarranted.

To all of these, except one, the petitioner objected. These exhibits contained certain statements and admissions against interest which were given some weight in the decision of the case by the Board of Tax Appeals.

From the findings and opinion of the Board it appears that only such matter in these documents as was in the nature of admissions against interest or pertinent was given consideration in arriving at its decision. The ruling of the Board permitting these exhibits is to be received in evidence for the purpose stated was not error.

The petitioner during the taxable years 1923 to 1926 was affiliated with the California Central Railroad Company and the San Juan Pacific Railroad Company, and the affiliated companies filed consolidated returns.

In 1912 the California Central Railroad Company issued its own bonds at a discount. In amortizing this bond discount over the life of the bonds, the amount of the amortization applicable to each of the four years under consideration is $3,381.18. The Commissioner allowed part of this amount as deductions in the consolidated returns for 1923, 1924, 1925 and 1926, the amounts disallowed being the amortization on bonds held by petitioner. The Board sustained the Commissioner's action.

There is no express provision in the Revenue Act which grants the right to a taxpayer to deduct an amortized discount over the life of the bonds where the bonds are issued at a discount, but this privilege is derived from certain Treasury regulations. The regulations here invoked as the basis for this claim are:

Treasury Regulations 62:

> Art. 545. * * *
>
> (3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds.

Treasury Regulations 69:

> Art. 635. Consolidated net income of affiliated corporations.—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations),

> the consolidated taxable net income shall be the combined net income of the several corporations consolidated.

Under these regulations the Commissioner and the Board of Tax Appeals have uniformly held that the acquisition of bonds of a subsidiary company by a parent company, as in this case, are intercompany transactions, and the amortization of discount on such bonds is not deductible in a consolidated return. While the point is not without difficulty, we are unable to say that the determination of the Board of Tax Appeals is not correct.

Petitioner urges as error failure of the Board to allow as deductions from income the amount of $1000 paid by petitioner for each of the years 1923 to 1926 inclusive, as its allotment to the San Francisco Community Chest, also the failure to allow as a deduction $2500 paid by petitioner in the year 1926 to the San Francisco Y. M. C. A., and further, the failure to allow as a deduction the amount of $3000 paid by petitioner in the year 1926 to a fund to promote a State-wide referendum for an increased gasolene sales tax levy.

Although the statutes permit deductions for contributions to charitable organizations by individuals, there is no provision for such deductions by corporations. It is provided, however, by certain Treasury regulations that certain donations made by a corporation may be deducted as an ordinary and necessary business expense, where such donations are to institutions conducted for the benefit of the

corporation's employees, also donations "for a benefit flowing directly to the corporation as an incident to its business."

The donations to the San Francisco Community Chest clearly come within the class of contributions from which only indefinite and indirect benefit may be expected, which would not bring these within the regulations. The contribution listed on petitioner's book as "All California Highway Lobbying $3,000", and concerning which petitioner's witness testified that the term lobbying might be interpreted as being correct, is not such an outlay as constitutes an ordinary and necessary business expense. There was no error in not allowing this item. The contribution of $2500 to the Y. M. C. A. of San Francisco toward its building fund, was made with the understanding that so far as the cement supplied in the building concrete construction work was concerned, the petitioner would receive its share on the proportional basis of its donation, and that petitioner as a result did receive its proportion of the cement work for that individual job, and for other work in the immediate vicinity which came under the Y. M. C. A. project. We are constrained to hold that petitioner's so-called donation was in fact a business expenditure made for the purpose of directly acquiring more business and so deductible in computing income as a business expense.

Accordingly the petition of the taxpayer praying that the subscription relating *the* Y. M. C. A. be treated as an ordinary and necessary business expense is granted. The order and decision of the

Board of Tax Appeals in all other respects is affirmed.

[Endorsed]: Opinion. Filed Mar. 12, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7195

OLD MISSION PORTLAND CEMENT COMPANY, a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed in all respects except that the petition of the taxpayer praying that its $2500 subscription to the San Francisco Y. M. C. A. in 1926 be treated as an ordinary and necessary busi-

ness expense be granted, and that this cause be, and hereby is remanded to the said Board of Tax Appeals for further proceedings in accordance with the opinion of this court.

[Endorsed]: Filed and entered Mar. 12, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

MOTION FOR FURTHER STAY OF MANDATE.

Comes now the above designated petitioner, by and through its attorney, and moves the HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS, Ninth Circuit, to further stay mandate in the above proceedings until June 12, 1934, pending preparation of the record by the Clerk and the filing of petition for certiorari in the Supreme Court of the United States.

GEO. E. H. GOODNER
Attorney for Petitioner,
Address: Munsey Building,
Washington, D. C.

[Endorsed]: Filed May 12, 1934. Paul O' O'Brien, Clerk.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Geo. E. H. Goodner, counsel for the petitioner, and good cause therefor appearing, IT IS ORDERED that the issu-

ance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including June 11, 1934; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California,
May 12, 1934.

[Endorsed]: Filed May 12, 1934. Paul O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and fifty-seven (357) pages, numbered from and including 1 to and including 357, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of May, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 359] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the right of the taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 107

OLD MISSION PORTLAND CEMENT COMPANY
A Corporation, Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT,

AND

SUPPORTING BRIEF.

[illegible]

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Supreme Court of the United States.

OCTOBER TERM, 1934.

OLD MISSION PORTLAND CEMENT COMPANY, a Corporation, *Petitioner*,
v.
GUY T. HELVERING, as Commissioner of Internal Revenue, *Respondent.*

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals, Ninth Circuit, involving a decision by that Court in the case of Old Mission Portland Cement Company, a corporation, *v.* Guy T. Helvering, as Commissioner of Internal Revenue, respondent, No. 7195, wherein that Court affirmed a decision of the United States Board of Tax Appeals, except as to one point not here involved. The Court's opinion was entered March 12, 1934 (pp. 341–355 of printed record) and the Court's judgment was entered on March 12, 1934 (R. 355–6).

QUESTIONS PRESENTED.

The case presents the following questions:

1. Did the Board of Tax Appeals, and therefore the Court, err in holding that "respondent's determination of the March 1, 1913, value of the petitioner's limestone deposits and his allowances for depletion should not be disturbed" when respondent offered no evidence to support his determination and all the evidence supported a greater value?

2. Did the Board of Tax Appeals, and therefore the Court, err in holding that respondent was not bound by his own documentary evidence as to the March 1, 1913, value of petitioner's limestone deposits?

3. When a corporation has sold bonds at a discount and is amortizing that discount over the life of the bonds in accordance with the regulations through equal annual deductions from income, is it proper to take the deduction in computing the consolidated net income of that corporation and petitioner, when petitioner is the present owner of the bonds?

4. Is a contribution by petitioner to the Community Chest of San Francisco an ordinary and necessary business expense, when petitioner's business would suffer if it refused to make the contribution?

5. Is a contribution by petitioner to a fund to support a state-wide referendum in California to increase the gasoline sales tax, for the purpose of providing funds for a twelve year road building campaign, an ordinary and necessary business expense, when petitioner is in the business of selling road material and expects to furnish part of the material used if the referendum carries?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Old Mission Portland Cement Company, petitioner, is a corporation organized under the laws of the State of California on February 10, 1912, for the purpose of engaging in the manufacture of Portland Cement, with its principal office at San Francisco, California (R. 61). In that year, it issued part of its stock for certain limestone deposits, known as the Barbee, Underwood, and Flint, located about 88 miles south of San Francisco, together with half of the machinery necessary for the construction of a one million dollar Portland Cement plant and 2463 acres of land (R. 62).

The Commissioner of Internal Revenue determined that,

on March 1, 1913, there were 1,700,000 tons of merchantable limestone in the three said deposits suitable for the making of Portland Cement and that the fair market value thereof on that date was $63,100.00 or 3.713 cents per ton of limestone in place. In computing petitioner's income for the years here involved, he allowed depletion deductions at the rate of 3.713 cents per ton for the limestone removed and consumed in those years (R. 68). Due to the scarcity on the Pacific Coast of limestone deposits suitable for making Portland cement, petitioner claims that the said deposits had a fair market value on March 1, 1913, far in excess of that allowed by the Commissioner, and that the depletion deductions allowed by the Commissioner should be increased.

There were three expert witnesses at the trial who testified to a March 1, 1913, value for the limestone of from 78 cents to 89 cents per ton. Respondent offered no testimony in support of his valuation, but the Board held that his determination should not be disturbed and the Circuit Court approved such holding.

Although respondent introduced documentary evidence showing that the March 1, 1913, value of the said limestone deposits was 79 cents per ton (Exhibit B — pp. 303–313 of Record), by which evidence he is absolutely bound under Section 907 of Title IX of the Revenue Act of 1924, as amended by Section 1000 of the Revenue Act of 1926, and as further amended by Section 601 of the Revenue Act of 1928, the Board failed to hold that this overcame his prima facie case and that he was bound by it, and the Court approved such action.

Throughout the years involved in this proceeding, petitioner was affiliated, within the purview of the law, with the San Juan Pacific Railway Company, a California corporation, and the California Central Railroad Company, a California corporation, and the three companies rendered consolidated income tax returns (R. 76).

In 1912, the California Central Railroad Company issued its own bonds at a discount, which discount it amortized over the life of the bonds at the rate of $3,381.18 each year. During the years involved in this proceeding, petitioner owned part

of the bonds of the California Central Railroad Company. In computing the consolidated net income, respondent recognized the right of the Railroad Company to amortize and deduct the bond discount, but he disallowed that portion of it applicable to the bonds which were held by petitioner. Such disallowance was on the ground that, to the extent that the discount applied to bonds held by petitioner, it was an intercompany transaction (R. 76–7). The Board and the Court approved such action.

In each of the years 1923 to 1926, inclusive, petitioner donated $1,000.00 to the San Francisco Community Chest, this amount being the allotment assigned to petitioner by the Community Chest Committee (R. 69–72). Petitioner deducted this amount in its income tax returns for the respective years as an ordinary and necessary business expense, but respondent disallowed the deductions and the Board and the Court approved such action.

In 1926, petitioner contributed $3,000.00 to a fund to be used in a state-wide campaign on a referendum to increase the gasoline sales tax in California, in order to provide the State with badly needed funds for additional road construction and maintenance over a period of 12 years. The referendum was successful and the State embarked on an extensive road-building campaign, using large quantities of cement and cement materials, of which petitioner furnished its proportionate share (R. 71–75, 265, 267–8). Petitioner deducted the $3,000.00 so contributed as a business expense in its 1926 income tax return and respondent disallowed the deduction. The Board and the Court approved such action.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Petitioner suggests the following reasons for allowance of the writ:

1. The Board of Tax Appeals made no finding of fact as to the March 1, 1913, value of petitioner's limestone deposits. All that it did was to hold that respondent's determination "should not be disturbed" (R. 88), when all of the evidence supports a greater value.

2. Respondent determined the March 1, 1913, value of the limestone in place to be 3.713 cents per ton, but offered no evidence to substantiate such a value. He did offer evidence, however, supporting a value of 79 cents per ton and he introduced in evidence petitioner's income tax returns for the years involved in which a depletion deduction of 20 cents per ton was taken. Petitioner offered the testimony of three competent expert witnesses who testified to values ranging from 78 cents per ton to 89 cents per ton. Although this evidence stands uncontradicted and although respondent himself introduced documentary evidence substantiating a value of 79 cents per ton, the Board held that, upon consideration of all the evidence, respondent's initial determination should not be disturbed.

3. It is well established that a finding of fact by the Board of Tax Appeals based upon substantial evidence will not be disturbed. *Phillips* v. *Commissioner*, 283 U. S. 589. But it appears to be a perversion of law and justice to refuse to disturb the Commissioner's determination when there is absolutely no evidence to support it and when all of the competent and material evidence shows a much greater value.

4. The Board's decision, and therefore the Court's, is in conflict with the decision of the United States Circuit Court of Appeals, Sixth Circuit, in *James R. Duffin* v. *Lucas*, 55 Fed. (2d) 786, wherein the Court held that when the presumption of correctness of respondent is overcome, the issue must be determined by the preponderance of the evidence.

5. There is no prima facie correctness of respondent's determination of value in this case, because his determination on the face of it is wrong. He based his valuation on a royalty rate paid on an entirely different limestone deposit, as of a date other than 1913, and under entirely different circumstances. (Exhibit 1—R. 288–290.) The decisions of the Board and of the Circuit Court are therefore directly in conflict with the decision of the United States Circuit Court of Appeals, First Circuit, in *Russell* v. *Commissioner*, 45 Fed.

(2d) 100, wherein the Court held that the rule as to the prima facie correctness of the Commissioner's determination does not apply when the determination is clearly erroneous on its face. In the instant case the Board and the Court have given approval to respondent's determination of value, even though it is erroneous on its face as pointed out above.

6. The action of the Board and therefore of the Court is in direct conflict with the law and the applicable rule of evidence. Section 907 of Title IX of the Revenue Act of 1924, as amended by Section 1000 of the Revenue Act of 1926, and as further amended by Section 601 of the Revenue Act of 1928, provides:

> "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in Courts of Equity in the District of Columbia."

Respondent introduced in evidence Exhibit B, the same being Form F filed by the taxpayer with the Bureau of Internal Revenue (set out in full at pages 303–312 of the printed Record). This document places the March 1, 1913, value of the Barbee, Underwood, and Flint deposits at 79 cents per ton of limestone in place (excluding the Gabilan deposit from consideration). This document was not offered by respondent as an admission againt interest, but even if it had been, respondent is bound by it and the Board and the Court erred in holding that he was not. In so doing, their decision is directly in conflict with the rule of evidence in Equity courts of the District of Columbia. The decision of the Board and of the Court in holding that the respondent was not bound by his own documentary evidence is in direct conflict with the holding of the Court of Appeals, District of Columbia, in *Leach* v. *Burr*, 17 App. D. C. 142, and *Lyon* v. *Bursey*, 36 App. D. C. 235, wherein the District of Columbia Court held that the party introducing documentary evidence is bound by it and can not impeach it.

7. In 1912 the California Central Railroad Company issued bonds at a discount (R. 76). Article 545 of Treasury Regulations 62 (promulgated under the Revenue Act of 1921 and applicable to the year 1923—same provision in subsequent regulations applicable to years 1924, 1925, and 1926) provides that, when bonds are issued by a corporation at a discount, the discount should be prorated or amortized over the life of the bonds and an aliquot part deducted each year. Under this provision the Railroad Company was entitled to deduct $3,381.18 each year. It did so and, in consolidating its income with that of petitioner each year, the deduction became a deduction in the consolidated return. Respondent recognized the right of the Railroad Company to deduct the discount in the years in question, but disallowed as a deduction in the consolidated return for each year the same proportion of the deduction that the bonds held by petitioner bore to the total outstanding bonds of the Railroad Company during the year (R. 76–7). The Board of Tax Appeals approved such action and the Court of Appeals affirmed the Board, although admitting that "the point is not without difficulty." (R. 373.)

If the discount charged off by the Railroad Company constituted an intercompany transaction, then of course the deduction should not be allowed in the consolidated return, provided of course that the corresponding amount of income received by petitioner is also excluded from consolidated income. But the point in the case is that petitioner did not receive any income and the deduction by the Railroad Company was not an intercompany transaction.

Because of the importance of this question in relation to affiliated corporations and in consolidated tax returns, and because of the seemingly inconsistent decisions thus far on the question, it appears that this Court should consider and decide it.

8. Petitioner contributed $1,000.00 each year to the Community Chest of San Francisco, this being the part of the total budget allocated to petitioner by the Community Chest Committee. The evidence is uncontradicted that the con-

tribution was necessary in order to maintain petitioner's good will and standing in the community and that its business would suffer and that it would be blacklisted if it did not make the contribution.

The Board of Tax Appeals disallowed the deduction without commenting upon it. The Circuit Court affirmed the Board on the ground that the contribution came clearly "within the class of contributions from which only indefinite and indirect benefit may be expected." This holding of the Court is in direct conflict with the holding of the United States Circuit Court of Appeals, Sixth Circuit, in *American Rolling Mill Company* v. *Commissioner*, 41 Fed. (2d) 314, wherein that Court said:

> "The question always is whether balancing the outlay against the benefit to be reasonably expected the business interests of the taxpayer will be advanced."

The Board's decision, and the Court's affirmance, are in direct conflict with a later decision of the Board of Tax Appeals in *The Evening Star Newspaper Company*, 28 B. T. A. 762, wherein the Board reversed its former position and held that a contribution to the Community Chest was deductible as a business expense. The Board has also allowed the deduction in other cases in which only a Memorandum Opinion was entered.

The deductibility of Community Chest donations by business corporations will be a recurring question until there are no longer any Community Chests and it will not be satisfactorily decided until passed upon by this Honorable Court.

9. In 1926 petitioner contributed $3,000.00 toward a referendum campaign carried on in the State of California to increase the gasoline sales tax in order to provide more funds to the State for road building and improvement. There can be no doubt from the record that petitioner thereby expected to increase its business and the evidence is that, in view of the success of the referendum, petitioner received its share of the new business and therefore accomplished its purpose. There

is no illegality connected with a contribution to a referendum and it can be easily understood that a 12 year road-building campaign would be beneficial to petitioner's business. The Board of Tax Appeals disallowed the deduction without comment and the Circuit Court affirmed the Board on the ground that the contribution "is not such an outlay as constitutes an ordinary and necessary business expense." In view of the Circuit Court's holding it seems proper that this Court should define, once and for all, the meaning of the words "ordinary and necessary business expense,"—especially in view of the decisions of other Circuit Courts on similar items.

See *Corning Glass Works* v. *Commissioner*, 37 Fed. (2d), 798; *American Rolling Mill Company* v. *Commissioner*, 41 Fed. (2d) 314; *The Forbes Lithograph Manufacturing Company* v. *White*, 42 Fed. (2d) 287. The spirit and intent of these decisions seem to be contrary to that of the Circuit Court in the instant case.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, Ninth Circuit, commanding that Court to certify and transmit to this Court for review and determination on a date to be therein named, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its docket No. 7195, Old Mission Portland Cement Company, a corporation, petitioner, *v.* Guy T. Helvering, as Commissioner of Internal Revenue, respondent; and that said judgment of said Circuit Court be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

GEO. E. H. GOODNER,
Counsel for Petitioner,
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Washington, D. C.

BRIEF

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals, Ninth Circuit, was entered March 12, 1934, and appears in the printed record at pages 341 to 355, inclusive. The Court's judgment, entered the same day, appears at pages 355–6 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 1003 of the Revenue Act of 1926.

FACTS.

The Old Mission Portland Cement Company, petitioner, is a corporation organized under the laws of the State of California on February 10, 1912, for the purpose of engaging in the manufacture of Portland cement, with its principal office at San Francisco, California (R. 61). In that year, it issued part of its stock for certain limestone deposits located about 88 miles south of San Francisco, about half of the machinery necessary for the construction of a million dollar Portland cement plant, and 2463 acres of land (R. 62).

The corporation experienced some difficulty and delay in commencing activities, but in 1916 it began actual construction work on its plant. The mill was completed by 1918 at an additional cost of about $500,000.00 and the manufacture of cement began (R. 62). Thereafter, operations were carried on continuously by it until in 1927, when the aforesaid limestone deposits were exhausted (R. 235; Exhibit 12). The aforesaid deposits were in three separate hills or outcrops comparatively short distances apart (R. 62). They are known as the Barbee, the Underwood, and the Flint deposits (R. 61). The Commissioner of Internal Revenue determined that on March 1, 1913, there were 1,700,000 tons of merchantable limestone in the three said deposits, suitable for the making of Portland cement,

and that the fair market value thereof on that date was $63,121.00, or 3.713 cents per ton of limestone in place. In computing petitioner's income for the years here involved, he has allowed depletion deductions at the rate of 3.713 cents per ton for the limestone removed and consumed in those years as follows (R. 68):

1923	$8,973.73
1924	7,875.87
1925	9,171.74
1926	9,135.69

Due to the scarcity on the Pacific Coast of limestone suitable for making Portland cement, petitioner claims that the said deposits had a market value on March 1, 1913, far in excess of that allowed by respondent and approved by the Board.

Throughout the years involved in this proceeding, petitioner owned substantially all of the capital stock of the San Juan Pacific Railway Company, a California corporation, and this latter company owned substantially all of the stock of the California Central Railroad Company, a California corporation. Respondent has ruled that the three companies were affiliated for income tax purposes throughout the years involved in this proceeding and there is no controversy over that ruling (R. 76).

In 1912, the California Central Railroad Company issued its own bonds at a discount, which discount it amortized over the life of the bonds at the rate of $3,381.18 each year. In computing consolidated net income for the years involved here, respondent has allowed deductions in respect of such bond discount, in the amount of $375.99 for the years 1923, 1924, and 1925, and in the amount of $220.59 for the year 1926. He disallowed the balance of the amount of such amortization applicable to the years in question, because those balances were applicable to bonds held in the respective years by petitioner. In other words, respondent recognized the right of the Railroad Company to amortize and deduct that portion of its bond discount applicable to the bonds held by the public,

but disallowed as a deduction that portion of the discount applicable to the bonds owned by petitioner (R. 76–7).

In each of the years 1923 to 1926, inclusive, petitioner donated $1,000 to the San Francisco Community Chest, this amount being the allotment assigned to the petitioner by the Community Chest Committee (R. 69–72). In 1926, petitioner contributed $3,000.00 to a fund to be used in a State-wide campaign on a referendum to increase the gasoline sales tax in California, in order to provide the State with badly needed funds for additional road construction and maintenance over a period of twelve years. The referendum was successful and the State embarked on an extensive road building campaign, using large quantities of cement and cement materials of which petitioner furnished its proportionate share (R. 71, 75, 265, 267–8). In computing the net income for the respective years, respondent has not allowed any of the aforesaid amounts as deductions.

STATUTES AND REGULATIONS INVOLVED.

This case involves the following provisions of law and regulations:

Revenue Act of 1921:

> Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.
>
> (Sections 234 (a) (1) of the Revenue Act of 1924 and 1926 are identical.)
>
> * * * * * * * *
>
> (9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted:
>
> *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the

property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date.

Revenue Act of 1924:

Sec. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * * * *

(8) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary.

Sec. 204.

* * * * * * * *

(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5), of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property.

(The provisions of section 234 (a) (8) and 204 (b) and (c) of the Revenue Act of 1926 are identical.)

Revenue Act of 1928:

Sec. 601.

Section 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

* * * * * * * *

Sec. 907 (a) * * * * * *

Hearings before the Board and its divisions shall be

open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.

Treasury Regulations 62:

Art. 545. * * * * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds.

(Article 545 of Treasury Regulations 65 and 69 contain the same provisions.)

Treasury Regulations 69:

Art. 635. Consolidated net income of affiliated corporations.—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated.

SPECIFICATIONS OF ERROR.

Petitioner makes the following assignments of error, which will furnish the basis of the following argument in support of the allowance of the writ:

1. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that the determination of the Commissioner of Internal Revenue as to the March 1, 1913, value of petitioner's limestone deposits should not be disturbed.

2. The Board of Tax Appeals, and therefore the Circuit Court, erred in failing to hold that respondent was bound by his own documentary evidence upon the March 1, 1913, value of petitioner's limestone deposits.

3. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that deductions by the California Central Railroad Company in amortizing the discount at which it sold its bonds, taken in computing its taxable income, are not deductible in consolidated returns of such company and petitioner, even though petitioner was the owner of the bonds.

4. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that contributions by petitioner to the San Francisco Community Chest were not ordinary and necessary business expenses.

5. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that a contribution by petitioner to the expenses of a state-wide referendum in California for increased gasoline sales taxes was not an ordinary and necessary business expense, when petitioner expected increased business as the result of a successful outcome on the referendum.

ARGUMENT.

The following argument will be based upon the foregoing assignments of error.

1. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that the determination of the Commissioner of Internal Revenue as to the March 1, 1913, value of petitioner's limestone deposits should not be disturbed.

The statutes provide for the deduction from income of a "reasonable allowance for depletion," "according to the peculiar conditions," and based on the "fair market value"

of the property on March 1, 1913. See Section 234 (a) (9) of the Revenue Act of 1921 (*supra*) which is applicable to the year 1923; Sections 234 (a) (8) and 204 (b) and (c) of the Revenue Act of 1924 (*supra*) which apply to the year 1924; and Sections 234 (a) (8) and 204 (b) and (c) of the Revenue Act of 1926 (*supra*) which apply to the years 1925 and 1926.

Respondent divided 1,700,000, the number of tons of stone, into $63,121.00, his fair market value of the property on March 1, 1913, and thereby arrived at 3.713 cents per ton in place, the depletion deduction allowed. This method of arriving at the depletion deduction is not in dispute,—only the fair market value of the deposits.

Respondent's method of arriving at the value of the $63,121.00 which he used is set out in Exhibit 1 (R. 288-294), which exhibit was offered in evidence by petitioner "solely for the purpose of showing how the Commissioner arrived at the depletion deductions" (R. 105). This exhibit constitutes the valuation report made by respondent's engineer, John Seward, and approved by his chief and adopted by respondent as his own. (See statement made in deficiency letter, R. 46.) The pertinent part of that report is as follows:

> "This case was investigated in the field according to Engineer Revenue Agent's Report of November 3, 1927. The report recommends a March 1, 1913, value of limestone of $63,121.00 based on discounting a royalty rate of ten cents per ton, which was paid by taxpayer on a contract in effect for the first time in 1920. The resulting March 1, 1913, value is further discounted by a five year deferment from 1913 to the start of quarry operations in 1918. Although the foregoing valuation is not supported by a royalty rate effective in 1913, it is recommended that it be tentatively approved, as taxpayer has been unable to submit an acceptable basis of valuation."

It is thus apparent that respondent made no attempt whatever to value the property on March 1, 1913, but, on the contrary, took a royalty rate paid for some limestone in 1920 and by discounting that in some manner arrived at his total valuation of $63,121.00. Petitioner has heard of a lessor's

value being determined by arriving at the present worth of the expected royalties to be received by said lessor; in fact, this is a very common way of arriving at the value of a lessor's interest in property. But this is the first time that petitioner ever heard of any one determining value for a property by discounting the royalty paid to some one else on an entirely different property and at a different time. Obviously respondent's basis of valuation has no merit whatever and is entirely wrong. It therefore follows that there can be no presumption of correctness thereto.

Respondent says in the above quoted paragraph that "although the foregoing valuation is not supported by a royalty rate effective in 1913, it is recommended that it be tentatively approved." This is an admission that his basis is wrong and that he failed to determine fair market value. Therefore, the presumption of correctness of his determination is overcome and the preponderance of evidence rule should prevail. *Russell* v. *Commissioner* (1 C. C. A.) 45 Fed. (2d) 100; *Duffin* v. *Lucas* (6 C. C. A.) 55 Fed. (2d) 786.

Respondent offered in evidence the 1918, 1919, 1920, and 1921 income tax returns of petitioner for the purpose of showing the income and depletion (R. 276–8). The depletion deduction taken in those returns was 10 cents per ton (R. 68). Respondent also offered in evidence Form F (Exhibit B). This Form F states that the fair market value of the limestone in the three deposits in question on March 1, 1913, was 79 cents per ton (R. 309, 311). It also states that if these deposits were combined with the Gabilan deposit and the life of the whole extended over a period of forty years or more, thus deferring the realization of income and thereby reducing the present value of it, then the total limestone in the four deposits, considered together, had a fair market value on March 1, 1913, of 20 cents per ton of stone in place. After executing and filing this Form F in December, 1922, petitioner took a deduction of 20 cents per ton in its returns filed thereafter, pending a ruling by respondent as to whether the three deposits should be valued and depleted separately or should be combined with the Gabilan deposit. Not until November, 1927, did

respondent reach a determination of value and the basis for the depletion deductions. He then decided that the three deposits, Barbee, Underwood, and Flint, should be valued and depleted separately. (Exhibit 1.) This, however, was after the income tax returns for the years here in question were filed. Therefore, on the basis of respondent's determination that the three deposits should be valued separately and on the basis of Form F (his Exhibit B, by which he is bound), the Board should have found and held without considering the evidence of petitioner's expert witnesses, that the value of the limestone in the three deposits on March 1, 1913, was 79 cents per ton.

Petitioner had three expert witnesses who testified to the March 1, 1913, value of its Barbee, Underwood, and Flint limestone deposits. The first was Mr. Ira Judson Coe, who graduated from Cornell University in 1894 with the degree C. E. Since that date, up to the date of testifying in 1931, he had been almost constantly engaged in the cement manufacturing business and the use of limestone. His early experience was in the limestone areas of the eastern portion of the United States, but in 1903 he located in California and, because of his former experiences and his qualifications, he immediately became one of the leading authorities on limestone and the cement industry on the Pacific Coast. He first saw the three limestone deposits here in question in 1904 and made a favorable report upon them at that time. He was thoroughly familiar with those deposits in 1913 and with the scarcity of limestone available for cement manufacture on the Pacific Coast, particularly in California. He was also familiar with every limestone deposit in the State which was commercially workable and, out of the wealth of his experience and knowledge gained prior to March 1, 1913, he told the Board the fair market value of those deposits on March 1, 1913, was 82 cents per ton (R. 105–163).

The next expert witness which petitioner used was Mr. Herbert Coffman, who at the time he testified was research engineer for the Hercules Cement Corporation, one of the large cement corporations in the East with headquarters in Philadelphia, and who also represented that corporation on the

Conservation Committee of the Portland Cement Association of the United States. Mr. Coffman graduated from the University of Pennsylvania in 1900 with the degree of Bachelor of Science and Chemistry. He immediately engaged in the cement business and, at the time he testified in 1931, he had had more than thirty years of actual experience in that business. He went to California in 1907 and became identified with the cement industry there. He was thoroughly acquainted with the value of limestone suitable for the making of Portland cement on the Pacific Coast and particularly in California. He knew of the properties here in question in 1913. He knew what it would cost to operate them; he knew what the market for cement was; and knew the profits that were being made. Based upon his knowledge and experience up to March 1, 1913, he told the Board that, in his opinion, the value of the Barbee, Underwood, and Flint deposits as of March 1, 1913, was 78¼ cents per ton (R. 163–186).

The third expert witness used by petitioner was Mr. F. S. Richards, one of the outstanding engineers in the cement industry to-day. In 1907, Mr. Richards completed a six-year chemical engineering course, especially designed for the cement industry, and immediately engaged in the active practice of his profession. He worked both in the United States and in Australia, and, in 1913, was thoroughly familiar with limestone conditions in the principal parts of the world. He was not in California in 1913 and did not locate there until about 1926, but, immediately upon arriving there, he made an intensive study of the particular limestone properties here in question, which had then been operating since petitioner's mill was completed in 1918. Mr. Richards delved into the early history of the property and the early history of every limestone property in California suitable for making Portland cement. Limestone suitable for this purpose was so scarce and so valuable that his services were greatly in demand by moneyed people who were attracted by the profits to be made in the manufacture of cement if suitable raw material could be found within transportation distance of an adequate market. At the time Mr. Richards testified before the Board (1931), he

probably had more accurate information through his own research, study, and investigation of the limestone and cement situation on March 1, 1913, than any other individual in the whole United States. His testimony was necessarily retrospective because he was not in California in 1913 and had not seen the particular deposits in question on March 1, 1913, but he was a witness thoroughly competent and prepared to look back into the past and express an opinion and conclusion logically drawn. If, with his technical knowledge and world-wide experience, he was not able to visualize the situation on March 1, 1913, and testify to the fair market value of the three limestone deposits in question, how could a member of the Board of Tax Appeals, who had no training at all in the limestone and cement industry and no such experience, be expected to determine the fair market value which the law requires him to do? Surely the retrospective view of one thoroughly competent and qualified, is better and more to be accepted than that of one with no experience whatever in the particular subject-matter. Mr. Richards told the Board that, in his opinion, the fair market value of the three deposits on March 1, 1913, was 89 cents per ton, and he gave the Board his reasons, as will be evidenced from a perusal of his testimony appearing on pages 186 to 271 inclusive of the printed record.

Respondent had no witnesses and offered no testimony whatever upon the March 1, 1913, value of the three deposits. He simply relied upon the presumption of correctness of his own determination. The testimony of petitioner's three expert witnesses stands absolutely uncontradicted, yet the Board member, without any experience whatever in the cement industry and without any personal knowledge of the value of limestone in California and petitioner's three deposits in particular, refused to accept it. Petitioner submits that this constitutes error on the part of the Board.

Conrad & Co. v. *Com.* (1 C. C. A.), 50 Fed. (2d) 576.
Bonwit Teller & Co. v. *Com.* (2 C. C. A.), 53 Fed. (2d) 381.
Boggs & Buhl v. *Com.* (3 C. C. A.), 34 Fed. (2d) 859.
Nichols v. *Com.* (3 C. C. A.), 44 Fed. (2d) 159.
Pittsburgh Hotels Co. (3 C. C. A.), 43 Fed. (2d) 345.

American Chemical Paint Co. v. *Com.* (3 C. C. A.), 66 Fed. (2d) 381.
Chicago Ry. Equipment Co. v. *Blair* (7 C. C. A.), 20 Fed. (2d) 10.
Planters' Operating Co. v. *Com.* (8 C. C. A.), 55 Fed. (2d) 583.
Citrus Soap Co. v. *Lucas* (9 C. C. A.), 42 Fed. (2d) 372.
Dempster Co. v. *Burnet* (D. C. App.), 46 Fed. (2d) 604.

It takes but little evidence to overcome the prima facie correctness of the Commissioner's determination. Surely the testimony of three of the outstanding authorities in the United States on the cement industry, whose testimony stands uncontradicted in the record, is sufficient to overcome the prima facie correctness of respondent's determination in this case. It is submitted that the Board's failure and refusal to so hold constitutes reversible error.

If such expert witnesses as petitioner used are not be be accredited at all, especially when they stand uncontradicted, it would seem that an appeal to the Board of Tax Appeals under the rules of evidence prescribed by statute is but a farce. Petitioner submits that the testimony of its three competent expert witnesses and the documenaary evidence which it introduced did overcome the prima facie correctness of respondent's determination and the burden of refuting that testimony became respondent's. Since he brought in no witnesses, not even his own expert engineers, it is only logical to suppose that he was not able to offer any such evidence.

It has been held that, when respondent's prima facie correct determination is shown to be erroneous, the preponderance of evidence rule prevails and that the initial presumption of correctness of the Commissioner's determination can not balance or turn the scale. *Duffin* v. *Lucas* (6 C. C. A.), 55 Fed. (2d) 786; *Russell* v. *Com.* (1 C. C. A.) 45 Fed. (2d) 100. As pointed out above, there can be no question but that petitioner's evidence overcame respondent's prima facie determination. Since he offered no evidence to support his value of 3.713 cents

per ton, it follows that the Board should have determined the value under the evidence in the record.

Respondent will doubtless lay great stress on the sheriff's sale in 1912 and argue that this indicates very little value to the limestone deposits as of March 1, 1913. The record clearly shows, however, that the sale was made at the instance of the holders of the bonds of the prior corporation who were also the principal stockholders, and that the price paid at the sale was merely the amount necessary to defray the cost of the sale; that the committee representing the bondholders bid in the property (R. 61). It must be obvious to any one that with over half a million dollars worth of machinery on the ground, as part of the property sold, those interested would not have permitted a sale at any such price as $20,700.00. So it is submitted that the sheriff's sale in 1912 is of no benefit in determining the March 1, 1913, fair market value of the property.

Respondent will doubtless argue that the property was not very valuable because of the delay in commencing operations until 1918. The record shows, however, that the stage was all set for commencement of operations back in 1906 and that it was interrupted at that time because of internal dissension among the developers. The moneyed interests then withdrew from the proposition and those retaining control could not finance it because of the panic of 1907 and the great losses sustained in the San Francisco earthquake and fire (R. 61–2). The record shows that Mr. Coffman made a careful examination of the property in 1916, and again recommended its operation as being favorable (R. 166). The actual operating history of the property is further substantiation of its worth on March 1, 1913 (Exhibit 12—R. 301).

Respondent apparently thought to discredit petitioner's case by bringing up the oyster shell deposit in San Francisco Bay. He overlooked the fact, however, that oyster shells had no value as cement material until in 1920 when machinery was first constructed to grind them successfully (R. 224–5).

Again respondent thought the fact that petitioner had purchased limestone at 10 cents per ton during some of the

years here involved would explode its contentions, but the testimony shows that the cost to petitioner of getting this 10 cent stone in excess of the cost of getting its own stone was as much as the value now claimed for its own stone (R. 233–234, 258–260).

Mr. Richards testified and Exhibit 10 (R. 298) shows that the average price of a barrel of cement in California for the 11 years preceding 1913 was $1.50 and that the average for the United States for the same period was nearly 50 cents less; that these prices interpreted in values of limestone per ton mean more than $1.00 per ton in favor of California limestone. In other words, California limestone was worth $1.00 per ton more than that of the rest of the United States during the 11 years just prior to 1913. Since the value of limestone in the eastern part of the country is only a few cents per ton, this evidence fairly checks and corroborates petitioner's contentions as to March 1, 1913, value.

The Board had the independent, unbiased opinion and judgment of three qualified experts. Each one approached the question through his own experience and arrived at the answer in a different manner or by a different formula. The variation in the answers is not great. In fact, the answers are so near together that the Board should have had very little difficulty in arriving at a value per ton which fairly approximates that contended for by petitioner.

Summing up, there is on the one hand the expert testimony of three highly qualified witnesses, corroborated by respondent's own evidence, Exhibit B, all of which proves a value of not less than 78 cents per ton. The only evidence to the contrary, if it is considered evidence at all, is the fact that petitioner took deductions at only 10 cents per ton during the first four years of its operations and 20 cents during the next four years. Surely the preponderance of evidence is decidedly in favor of petitioner and not in favor of respondent's determination of 3.713 cents per ton, to support which no evidence whatever has been introduced. It is therefore submitted that the Board was in error in holding as it did that the evidence was not sufficient to overcome the prima facie correctness of

respondent's determination and that the Circuit Court erred in affirming the Board.

2. The Board of Tax Appeals, and therefore the Circuit Court, erred in failing to hold that respondent was bound by his own documentary evidence upon the March 1, 1913, value of petitioner's limestone deposits.

There was no occasion for any determination of March 1, 1913, fair market value of the three said deposits until petitioner began to operate them and manufacture cement in 1918. In its income tax returns for the years 1918 to 1921, inclusive, petitioner took a depletion deduction of 10 cents per ton, which was purely arbitrary and not based on any definite appraisal or determination of value. However, on receipt of respondent's request for a report on the March 1, 1913, fair market value of its limestone, petitioner executed respondent's Form F (Exhibit B, pp. 301–313) for "Inorganic Nonmetallic Mineral Properties" and filed same with the Commissioner in December, 1922. In that report it set out the value of the three limestone deposits here in question at 79 cents per ton of stone in place on March 1, 1913. It stated that if these properties were thrown in with the Gabilan property so as to extend the time of full realization of the total contents to forty years or more, thus materially reducing the present worth of the whole, then the value per ton on March 1, 1913, would be 20 cents. It put it up to the Commissioner to decide whether the three deposits should be valued alone or with the Gabilan. In its 1922 tax return petitioner took a depletion deduction of 20 cents per ton on the limestone consumed and continued to take the same deduction in later years, awaiting respondent's determination as to whether depletion should be allowed on the basis of the three deposits here in question, valued separately, or on the basis of combining them with the Gabilan property. Respondent finally determined that the three deposits here in question should be valued and depleted separately, but, instead of allowing the depletion deductions at the rate of 79 cents as set out in said Form F (Exhibit B), he reduced the

value to 3.713 cents per ton and allowed that amount for the years here in question.

The general rule as to documentary evidence is stated in 22 Corpus Juris, pages 972–3 as follows:

> "A book or document offered in evidence must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor." Citing
>
> *Butler* v. *The Arrow*, 4 F. Cas. No. 2,237, 6 McLean 470.

> "As a general rule, although a document is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes." Citing
>
> *U. S.* v. *Williams*, 18 Phillipine 291.
>
> *U. S.* v. *Diaz*, 15 Phillipine 123.

> "Where a document is introduced for the purpose of impeaching a statement of fact therein, and the party fails to so impeach it, all material facts alleged in the document are presumed to be true and the party introducing *it is bound thereby.*" Citing
>
> *U. S.* v. *Williams*, 18 Phillipine 291.

In the District of Columbia, the rule is that the party introducing documentary evidence is absolutely bound by it and can not contradict or impeach it.

> *Leach* v. *Burr*, 17 App. D. C. 142.
>
> *Lyon* v. *Bursey*, 36 App. D. C. 235.

Respondent introduced the aforesaid Form F (Exhibit B) as his evidence and not as an admission or declaration against interest (R. 280–281). Under the District of Columbia rule, he is therefore bound by it and to a value of 79 cents per ton. It was error for the board to hold otherwise.

The testimony of petitioner's three expert witnesses is directly in line with respondent's evidence in Exhibit B. Mr. Coe testified to a March 1, 1913, value per ton for the three deposits of 82 cents. Mr. Coffman testified to a value of 78 cents. And Mr. Richards testified to a value of 89 cents.

Respondent's Exhibit B (Form F) gives 79 cents. These four amounts so close together constitute not only the preponderance of evidence as to value in the case, but practically all of the evidence. The range of value, therefore, according to the evidence, is from 78 cents to 89 cents per ton. It is true that Mr. Richards' testimony is based partially upon subsequent history and, standing alone, might not be sufficient to warrant the value claimed, but when it is so near to the determination of petitioner when first called upon by respondent to fill out Form F, it must certainly be valuable as corroborative testimony, at least.

The only documentary evidence which respondent introduced bearing on the question of the 1913 value at all is Form F (Exhibit B). It is true that he introduced petitioner's income tax returns for the years 1918 to 1921, inclusive (Exhibits I, J, K, and L), in which a deduction of only 10 cents per ton for depletion was taken, but that was a purely arbitrary deduction and before petitioner was called upon to appraise its property and file Form F. Each income tax year is a period unto itself and determination of the correct income must be made regardless of any mistakes made in other years. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 51 S. Ct. 150. These returns for 1918 to 1921, inclusive, were not offered as admissions against interest, but merely to show the income and depletion for those years. Their admission was doubtless improper but, assuming for the sake of argument that there was ground for their admission, there is no law providing that a taxpayer, having made a deduction of a certain amount for depletion in one year, is forever bound to that deduction thereafter. In the last analysis, if these returns for the years 1918 to 1921, inclusive, should be considered as evidence tending to show the 1913 value of the three limestone deposits, it must be remembered that *they are also respondent's evidence* and, under the District of Columbia rule, he would be bound by them. Therefore, even under such an extreme holding as that, the Board and the Circuit Court erred in holding that respondent was not bound by his own evidence.

3. The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that deductions by the California Central Railroad Company in amortizing the discount at which it sold its bonds, taken in computing its taxable income, are not deductible in consolidated returns of such company and petitioner, even though petitioner was the owner of the bonds.

The facts in respect to this issue were found by the Board of Tax Appeals to be as follows (R. 76–77):

> "The California Central Railroad Company was organized under the laws of California in 1912, at which time it acquired in exchange for its stock and bonds all of the assets of the San Juan Pacific Railway Company, a California corporation organized prior to 1912. During the taxable years under consideration the petitioner was affiliated with the two railroad companies. The books of the three companies were kept, and consolidated income-tax returns filed, on the accrual basis.
>
> "In 1912, the California Central Railroad Company issued its own bonds at a discount. In amortizing this bond discount over the life of the bonds the amount of amortization applicable to each of the four years under consideration is $3,381.18. In computing the consolidated net income for the respective years, the Commissioner has allowed as a deduction for bond discount the sum of $375.99 in the years 1923, 1924, and 1925, and $220.79 in the year 1926. The balance applicable to each of these years, disallowed by the Commissioner, represents the amortization of bond discount applicable to bonds owned by the petitioner during these years."

The amount of bond discount amortization which respondent disallowed in each year and the amount in dispute are as follows:

1923	$3,005.19
1924	3,005.19
1925	3,005.19
1926	3,160.39

In its Opinion, wherein it sustained respondent's action, the Board did not discuss this issue but contented itself by saying (R. 89):

> "The facts of record do not distinguish the situation here presented from that ruled upon in New Orleans, Texas & Mexico Railway Co., 6 B. T. A. 436, 441, wherein we held that such bond discount was not deductible. Following that decision, the respondent's action in this particular is sustained. See also Gulf, Mobile & Northern Railroad Co., 22 B. T. A. 233, 261, wherein we followed our earlier decision on this point."

The California Central Railroad Company paid interest on its bonds held by petitioner; such interest payment was an inter-company transaction. The California Central Company deducted the amount of interest paid in its income tax return, and petitioner included that amount as income in its return. Thus, when the two returns are brought together in a consolidated return, one amount washes the other and both items are therefore eliminated. That is a typical illustration of an inter-company transaction.

But, when an item entering into the computation of income of one member of an affiliated group does not appear conversely in the income of another member, it is *not* an inter-company transaction and is *not* eliminated from the consolidated net income. Such an item was the bond discount item, which the California Central Railroad Company deducted in each of the years in question. This deduction did not represent income to petitioner because petitioner did not receive anything and made no entries whatever on its books in respect thereof. Not only were the net assets of the California Central Company reduced each year by the amount of the deduction, but likewise the total net assets of both companies together were that much less; therefore, it was not an inter-company transaction, and should be allowed as a deduction in consolidated net income just the same as any other deduction of the California Central Railroad Company, which was not income to the taxpayer. Art. 635 of Regulations 69 (*supra*).

It must be remembered that the writing off of the bond discount by the California Central Railroad Company was the amortizing of a deferred charge which it incurred through sales of its bonds years before and before petitioner was the owner of them, or any of them. This writing off is the regularly recognized and authorized method of taking care of bond discount when corporations are on the accrual basis, as in this case, and is in conformity with Treasury Department regulations. See Article 545 of Treasury Regulations No. 62, 65, and 69 (*supra*). Petitioner will realize 100 cents on the dollar at maturity for the bonds which it holds of the California Central Railroad Company, so the writing off of this loss by the California Central in no way affects petitioner. Since the California Central could not write off the total discount as the bonds were sold, to deny it the right to amortize the amount over the period, is to deny it the loss altogether.

It is not believed that respondent would have disallowed the deductions here questioned but for the Board's decision in the *New Orleans, Texas and Mexico Railroad Company* case, cited in the excerpt from the Board's opinion (*supra*). It is therefore pertinent to examine the Board's decision and the facts in that case.

An examination of that case discloses the fact that the Board did disallow the deduction for bond discount incurred under circumstances almost identical with those in the instant case, but the Board did not discuss the issue and rested its decision on the case of *Gould Coupler Company*, 5 B. T. A. 499. The latter case decided another issue altogether and furnishes no authority whatever for the position taken by the Board in the *New Orleans, Texas and Mexico Railroad Company* case.

Consideration of the *Gould Coupler Co.* case, however, is very enlightening in connection with the instant question. There the Board discussed at length the nature of consolidated income in the light of the legislative history of the provision. It sets forth the view that Congress intended consolidated income to be the income of the affiliated group as one economic unit. In the light of this discussion it appears that petitioner's contention in the instant case is sound because, if the California

Central Railroad Company and petitioner are considered as an economic unit, the unit would still be entitled to the deduction claimed.

It is therefore submitted that the Board and the Circuit Court erred in denying the bond discount deductions here in question.

4. **The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that contributions by petitioner to the San Francisco Community Chest were not ordinary and necessary expenses.**
5. **The Board of Tax Appeals, and therefore the Circuit Court, erred in holding that a contribution by petitioner to the expenses of a state-wide referendum in California for increased gasoline sales taxes was not an ordinary and necessary business expense, when petitioner expected increased business as the result of a successful outcome on the referendum.**

The law involved here is Section 234 (a) (1) of the Revenue Acts of 1921, 1924, and 1926 (*supra*), providing for the allowance as deductions of all "ordinary and necessary expenses."

The Board has heretofore recognized that so-called donations are very often in fact business expenses, deductible under the provisions of the law in computing income.

Poinsett Mills, 1 B. T. A. 6;
Anniston City Land Co., 2 B. T. A. 526;
Richmond Hosiery Mills, 6 B. T. A. 1247;
Superior Pocahontas Coal Co., 7 B. T. A. 380;
Ranier Grand Co., 11 B. T. A. 520;
Hirsh-Weis Mfg. Co., 14 B. T. A. 796;
Los Angeles and Salt Lake R. R. Co., 18 B. T. A. 168;
First National Bank of Omaha, 18 B. T. A. 1358;
The Killian Co., 20 B. T. A. 80.

The Courts have also recognized the fact that the Commissioner of Internal Revenue has frequently gone too far in

disallowing business expenses on the theory that they were contributions and not deductible in computing income.

Corning Glass Works v. *Com.*, 37 Fed. (2d) 798;
American Rolling Mill Co. v. *Com.*, 41 Fed. (2d) 314;
The Forbes Lithograph Mfg. Co. v. *White*, 42 Fed. (2d) 287.

In *A. Harris & Co.* v. *Lucas* (5 C. C. A.), 48 Fed. (2d) 187, it was held that the two words "ordinary" and "necessary" are not used conjunctively and that Congress had in mind either ordinary or necessary expenses as being allowable deductions. But it matters not what construction is placed upon the phrase, in the case of business corporations, it still follows that their contributions are both very ordinary, in the sense of being of frequent occurrence, and are very necessary, if corporations expect to continue in business.

Corporations have no soul and business corporations exist for the purpose of earning profit. It can hardly be assumed that such corporations would from choice reduce their profits by making charitable donations. The logical assumption is,—and this is common knowledge among those who have engaged in business,—that corporations make their donations either to encourage and increase business, or to avoid adverse criticism and disfavor among the public which would result in a loss of business. Either purpose is bona fide and legitimate and brings the contributions within the class of ordinary business expenses.

During each of the years 1923 and 1926 inclusive, petitioner donated $1,000 to the San Francisco Community Chest. Respondent disallowed these deductions in his computation of income for the respective years and the Board approved respondent's action (R. 69, 73, 88).

Mr. Herbert Coffman, a witness on behalf of petitioner, testified that the San Francisco Community Chest was similar to organizations of that kind in the East and that, instead of having different associated charities coming around from time to time and asking for gifts and donations, they were all put into one lump sum in the Community Chest and they had one

visit a year. He stated that it was practically necessary to make these donations from a business standpoint; that they were all expected to contribute; that publicity was given to the contributions by publication of the list of contributors; that if his company, petitioner, had not been on the list, they would have been overrun with people wanting to know what was the trouble and why they had not contributed their share; that the biggest market for the output of their cement plant was in San Francisco and that it would have been a reflection upon petitioner not to have made the donations requested. When Mr. Coffman was asked if, in his opinion, a business could successfully operate without making these expenditures, he stated that he would not want to be the one to try it; that he thought it would be disastrous (R. 171–174). Mr. Coffman was sales manager of petitioner for the years 1923 to 1926 and was very intimately acquainted with the donations which petitioner made. It is always necessary for a selling organization to maintain its good will and failure to make reasonable donations for the public good is one of the quickest ways to destroy that good will. While Mr. Coffman was not personally consulted regarding these Community Chest donations and while he did not have the say as to whether or not the donations should be made, it was his business as sales manager to be intimately acquainted with the policies and activities of this company, and he was thoroughly competent to state the purpose of making the donations and what the result would have been if the donations had not been made. Mr. Coffman's testimony on this point is fully corroborated by Mr. Richards (R. 270–271).

There was a time when both respondent and the Board of Tax Appeals refused to allow donations to the Community Chest as deductions in computing income, on the theory that they were not authorized by the law. But since the decision in the instant case, the Board has reversed its position and is now allowing Community Chest donations as deductions from income upon a showing that the corporation could not afford to refuse to make the donation and would suffer from a business standpoint if it did. Such was the evidence in the instant case

and it is believed that, if the Board had this case now under consideration upon the record made, its decision would be favorable to petitioner rather than adverse.

In *The Evening Star Newspaper Co.*, 28 B. T. A. No. 762, promulgated July 7, 1933, the Board said:

> "The sole question for decision is whether the petitioner should be permitted to deduct from its gross income its contributions of the Washington Community Chest. Such a contribution when in the nature of a gift is deductible to a limited extent from the gross income of an individual. Sec. 23 (n) (2), Revenue Act of 1928. No such deduction is allowed to a corporation. But either may deduct such a contribution when it is shown that the contribution is in fact a business expense. American Rolling Mill Co. *v.* Commissioner, 41 Fed. (2d) 314; Killian Co., 20 B. T. A. 80. Since a contribution may be either a charitable gift or a business expense, a taxpayer in order to secure a deduction as a business expense must show by sufficient evidence that the expenditure had in a direct sense a reasonable relation to its business (Thomas Shoe Co., 1 B. T. A. 124) or, as said in Killian Co., *supra*, it must be 'reasonably motivated by or related to the proper conduct of the business.' See also American Rolling Mill Co. *v.* Commissioner, *supra*. Tested by these standards we think that the petitioner has shown that its contributions were ordinary and necessary expenses within the meaning of section 23 (a) of the Revenue Act of 1928. Harris & Co. *v.* Lucas, 48 Fed. (2d) 187.
>
> * * * * * * * *
>
> "Counsel for the respondent points out that the petitioner's witnesses were unable to show any specific gain in dollars arising from the contributions. This is an unreasonable demand. Alexander Sprunt & Son, Inc., 24 B. T. A. 599; Matson Navigation Co., 24 B. T. A. 14. It is sufficient that the directors had reasonable grounds to believe that their actions would be beneficial to the corporation. It was not necessary for them to expect additional gain. It was sufficient that they, with reasonable grounds, expected that it would prevent a loss. Kornhauser *v.* United States, 276 U. S. 145. Under either aspect we think the petitioner is entitled to the deductions claimed."

In a memorandum opinion, entered February 2, 1933, in the case of the *Killian Co.*, Docket 48053, the Board allowed as a deduction a donation made to the Community Chest of Cedar Rapids, Iowa. Since the financial depression came on and the Board's appropriation for expenses has been reduced, it has adopted the policy of entering a memorandum opinion in many cases rather than having opinions printed and published so that they can be cited in the regular way. Its decision in the *Killian Company* case, just cited, is an instance of that kind and this decision must not be confused with the former reported decision of the Board in the *Killian Company*, 20 B. T. A. 80, promulgated on June 16, 1930, which did not involve the question of deductibility of donations to the Community Chest.

As stated above, the earlier decisions of the Board were adverse to petitioner on this question, but these decisions were probably the result of failure on the part of petitioner to prove facts on which the Board could make a different holding. It is submitted that the Board reached the proper conclusion in *The Evening Star Newspaper Company, supra*, for the reasons therein stated, and that those reasons are equally applicable here. It is therefore submitted that the Board and the Circuit Court erred in refusing to allow the Community Chest donations as deductions in computing income.

In 1926, petitioner donated $3,000 to a fund to promote a State-wide referendum for an increased sales tax levy, in order that additional funds might be provided in the State of California for road building. Petitioner claimed this $3,000.00 donation as a deduction from 1926 income but respondent has disallowed it and the Board approved respondent's action (R. 69, 71, 75, 88).

The item here in question is referred to in Exhibit 16 (R. 302) as "All California Highway Lobbying, $3,000.00." Mr. Richards testified, however, that this is a misnomer, as the word "lobbying" conveys the wrong meaning. He stated that, prior to 1926, the State had a two-cent per gallon tax on gasoline, which could be used only for maintenance purposes; that it was essential, if the highway system was to be expanded and enlarged, that new roads be constructed; that the $3,000

was donated and used in a State-wide referendum campaign and that as a result of this campaign the people voted for a twelve-year road construction project. Petitioner actually pledged $10,000.00 toward this campaign but it was called upon for only $3,000.00 of the pledge. As the result of this donation and those made by other concerns, the road-building project was put under way and the State, since that time, has been spending enormous sums on the road construction; the greater part of the material used is concrete and petitioner has furnished its proportionate share (R. 265, 267–268).

Petitioner thought that a twelve year road building campaign would be extremely beneficial, or it would not have pledged $10,000.00 toward the referendum in getting the matter before the people. There can be no suggestion whatever that this $3,000.00 item was a charity; it was strictly a legitimate business expense; it was money spent with the very purpose of creating more business and it did result in much additional business. As such, it should have been allowed as a deduction from income.

CONCLUSION.

Wherefore, it is submitted that the petition for certiorari should be granted.

Respectfully submitted,

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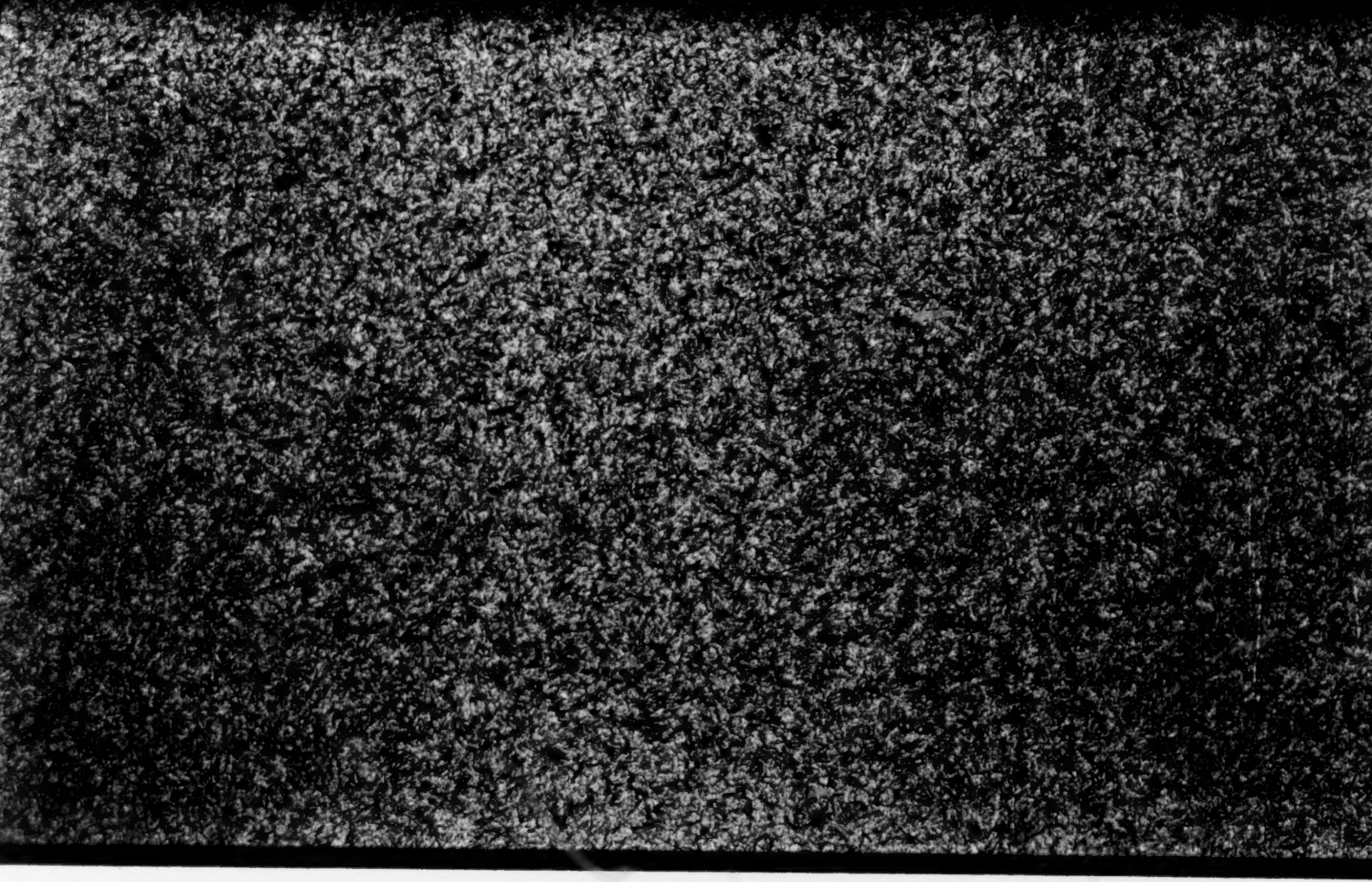

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 107.

OLD MISSION PORTLAND CEMENT COMPANY,
a corporation, PETITIONER,

v.

GUY T. HELVERING, as Commissioner of Internal Revenue, RESPONDENT.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

I. THE OPINION OF THE COURT BELOW.

The opinion of the U. S. Circuit Court of Appeals, Ninth Circuit, is reported at 69 Fed. (2d) 676, and is set out on pages 341-355 of the printed record. The Court's judgment appears on pages 355-6 of the record.

The opinion of the Board of Tax Appeals is reported at 25 B. T. A. 305 and is set out on pages 59-91 of the record.

II. JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 288) and under Section 1003 of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 1226).

A petition for certiorari was filed June 12, 1934, and was granted October 8, 1934.

III. STATEMENT OF THE CASE.

The Old Mission Portland Cement Company, petitioner, is a California Corporation organized in 1912 and engaged in the manufacture of Portland cement, with principal office at San Francisco, California (R. 61). For the years 1923 to 1926, inclusive, it filed consolidated income tax returns for itself and the California Central Railroad Company (R. 76).

The California Central Railroad Company was organized in 1912 and at that time it issued its stock and bonds at a discount for assets of the San Juan Pacific Railway Company. In amortizing the bond discount over the life of the bonds, the amount of amortization applicable to each of the four years 1923, 1924, 1925, and 1926 is $3,381.18 (R. 76).

Soon after the California Central Railroad Company had issued its stock and bonds, the stock was acquired by petitioner, and petitioner has continued to hold said stock throughout the years 1923 to 1926, inclusive, so that the two corporations were affiliated during those years for income tax purposes (R. 76).

From time to time petitioner acquired outstanding bonds of the California Central Railroad Company and even acquired some of them in 1926 (R. 231, 271). In computing consolidated net income for the four years in question, respondent allowed as a deduction for amortization of the aforesaid bond discount the sum of $375.99 in the years 1923, 1924, and 1925 and the sum of $220.79 in the year 1926. The balance of the bond discount disallowed in each year

by respondent, represented the amount of discount applicable to the bonds held by petitioner during these years (R. 76-7).

Petitioner appealed to the Board of Tax Appeals, claiming the right to deduct the total bond discount applicable to the respective years in computing consolidated net income for those years (R. 40, 42). The Board sustained the action of the respondent (R. 89) and the Circuit Court affirmed the Board (R. 351-3).

In each of the years 1923 to 1926, inclusive, petitioner contributed $1,000.00 to the San Francisco Community Chest and claimed the amounts as deductions from income in its income tax returns for the respective years. Respondent disallowed the deductions (R. 69). Petitioner appealed to the Board of Tax Appeals, claiming the contributions as deductions (R. 40-41, 69), but the Board sustained respondent's action (R. 88) and the Circuit Court affirmed the Board (R. 354).

Petitioner and the California Central Railroad Company kept books and rendered consolidated income tax returns on the accrual basis (R. 76).

IV. THE LAW.

The statutes and regulations involved are as follows:

Revenue Act of 1921:

> "Sec. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

(Sections 234 (a) (1) of the Revenue Act of 1924 and 1926 are identical.)

Treasury Regulations 62 (Rev. Act of 1924):

> "Art. 545.
> (3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds."

(Articles 545 of Treasury Regulations 65 (Revenue Act of 1924) and 69 (Revenue Act of 1926) contain the same provisions.)

> "Art 636. Consolidated net income of affiliated corporations. — Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of inter-company transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated."

(Article 636 of Regulations 65 (Revenue Act of 1924) and Article 635 of Regulations 69 (Revenue Act of 1926) contain identical provisions.)

V. SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals, Ninth Circuit, erred in holding that the total deductions taken by the California Central Railroad Company in computing its taxable net income for the years 1923 to 1926, inclusive, in amortizing the discount at which it sold its bonds, are not deductible in the consolidated income tax returns of such company and petitioner, for said years, even though petitioner was the owner of part of the bonds during such years.

2. The Circuit Court of Appeals, Ninth Circuit, erred in holding that contributions made by petitioner to the San Francisco Community Chest during the years 1923 to 1926, inclusive, were not deductible in computing taxable net income for those years.

VI. ARGUMENT.

1. The Circuit Court of Appeals, Ninth Circuit, erred in holding that the total deductions taken by the California Central Railroad Company in computing its taxable net income for the years 1923 to 1926, inclusive, in amortizing the discount at which it sold its bonds, are not deductible in the consolidated income tax returns of such company and petitioner, for said years even though petitioner was the owner of part of the bonds during such years.

The facts are set out above and need not be repeated here.

In its Opinion, wherein it sustained respondent's action, the Board of Tax Appeals did not discuss this issue but contented itself by saying (R. 89):

> "The facts of record do not distinguish the situation here presented from that ruled upon in New Orleans, Texas & Mexico Railway Co., 6 B. T. A. 436, 441, wherein we held that such bond discount was not deductible. Following that decision, the respondent's action in this particular is sustained. See also Gulf, Mobile & Northern Railroad Co., 22 B. T. A. 233, 261, wherein we followed our earlier decision on this point" (R. 89).

Likewise the Circuit Court of Appeals did not discuss the question except to say:

> "Under these regulations the Commissioner and the Board of Tax Appeals have uniformly held that the acquisition of bonds of a subsidiary company by a parent company, as in this case, are inter-company transactions, and the amortization of discount on such bonds is not deductible in a consolidated return. While the point is not without difficulty, we are unable to say that the determination of the Board of Tax Appeals is not correct" (R. 353).

If petitioner understands the Circuit Court, its decision

rests on the proposition that the acquisition of the bonds of the California Central Railroad Company by petitioner from third parties, long prior to the incidence of the consolidated returns provisions of the tax law, constitutes an inter-company transaction; and that this had the effect of wiping out the bond discount asset on the books of the subsidiary—that is, it was the same as if the California Central had redeemed its own bonds and realized the total loss at that time. But was that an inter-company transaction? And did the California Central *realize its loss* at that time?

To be an inter-company transaction both companies must be involved or affected in some manner. That is what the term "inter-company" means. *Gould Coupler Co.*, 5 B. T. A. 499. It is obvious that the California Central Co. was not affected when petitioner purchased its bonds from third parties, any more than it would have been affected if some other company had purchased them.

If it could be assumed that the California Central Company was affected to the extent of wiping out the unamortized bond discount on its books, what would have happened if petitioner had sold the bonds a year later? Would the unamortized discount be restored as an asset—a deferred charge—again to be amortized over the remaining life of the bonds? Obviously, the California Central Company's assets cannot be juggled in any such manner.

The point is that petitioner bought the bonds and held them as an investment the same as any other investment. Upon disposition of them it must account for profit or loss based upon its cost, whether or not it is affiliated with the California Central Company for tax purposes. *Commissioner of Internal Revenue* v. *The Van Camp Packing Company, Inc.*, 62 Fed. (2d) 596. If it holds them until maturity or until the California Central Company pays them, the act of payment may constitute an inter-company transaction, but that does not change the fact that the California Central Company has suffered a detriment—a loss—equal to the discount. Treasury Regulations provide that this loss shall

be taken in installments through equal annual deductions over the life of the bonds. Art. 545, Reg. 62, *supra.*

The question here is *not* whether the acquisition of the bonds by petitioner long prior to the taxable years was an inter-company transaction, but *whether the deduction by the California Central Company of that part of the bond discount applicable to the years in question was an inter-company transaction.*

The California Central Company paid interest each year on its bonds held by petitioner. Such interest payment *was* an inter-company transaction. The California Central Company deducted the amount of interest paid in its income tax return, and petitioner included that amount as income in its return. Thus, when the two returns are brought together in a consolidated return, one amount washes the other and both items are therefore eliminated. That is a typical illustration of an inter-company transaction. *Gould Coupler Co., supra.*

But, when an item entering into the computation of income of one member of an affiliated group does not appear conversely in the income of another member, it is *not* an inter-company transaction and is *not* eliminated from the consolidated net income. Such an item was the bond discount item, which the California Central Railroad Company deducted in each of the years in question. This deduction did not represent income to petitioner because petitioner did not receive anything and made no entries whatever on its books in respect thereof. Not only were the net assets of the California Central Company reduced each year by the amount of the deduction, *but likewise the total net assets of both companies together were that much less.* Therefore, it was not an inter-company transaction, and should be allowed as a deduction in consolidated net income just the same as any other deduction of the California Central Railroad Company, which was not income to the taxpayer. Art. 636 of Regulations 62 (*supra*).

It must be remembered that the writing off of the bond discount by the California Central Railroad Company was

the amortizing of a deferred charge which it incurred through sales of its bonds years before and before petitioner was the owner of them, or any of them. This writing off is the regularly recognized and authorized method of taking care of bond discount when corporations are on the accrual basis, as in this case, and is in conformity with Treasury Department regulations. See Article 545 of Treasury Regulations No. 62, 65, and 69 (*supra*). Petitioner will realize 100 cents on the dollar at maturity for the bonds which it holds of the California Central Railroad Company, so the writing off of this loss by the California Central in no way affects petitioner. Since the California Central could not write off the total discount as the bonds were sold, *to deny it the right to amortize the amount over the period is to deny it the loss altogether.*

It is not believed that respondent would have disallowed the deductions here questioned but for the Board's decision in the *New Orleans, Texas and Mexico Railroad Company* case, cited in the excerpt from the Board's opinion (*supra*). It is therefore pertinent to examine the Board's decision and the facts in that case.

An examination of that case discloses the fact that the Board did disallow the deduction for bond discount incurred under circumstances almost identical with those in the instant case, but the Board did not discuss the issue and rested its decision on the case of *Gould Coupler Company,* 5 B. T. A. 499. The latter case decided another issue altogether and furnishes no authority whatever for the position taken by the Board in the *New Orleans, Texas and Mexico Railroad Company* case.

Consideration of the *Gould Coupler Co.* case, however, is very enlightening in connection with the instant question. There the Board discussed at length the nature of consolidated income in the light of the legislative history of the provision. It sets forth the view that Congress intended consolidated income to be the income of the affiliated group as one economic unit, and points out that "the loss of any member is a loss of the group." In the light of this dis-

cussion it appears that petitioner's contention in the instant case is sound because, if the California Central Railroad Company and petitioner are considered as an economic unit, the unit would still be entitled to the deduction claimed.

Since Article 636 of Regulations 62 (1921 Revenue Act) *supra,* and all Regulations since that time provide that consolidated net income is "the combined net income of the several separate corporations," subject only "to the elimination of inter-company transactions," and since the deduction of bond discount by the California Central Railroad Company is not an inter-company transaction, it follows that the Circuit Court erred in affirming the Board in denying the deduction.

2. The Circuit Court of Appeals, Ninth Circuit, erred in holding that contributions made by petitioner to the San Francisco Community Chest during the years 1923 to 1926, inclusive, were not deductible in computing taxable net income for those years.

During each of the years 1923 and 1926, inclusive, petitioner donated $1,000 to the San Francisco Community Chest. Respondent disallowed these deductions in his computation of income for the respective years and the Board and the Circuit Court approved respondent's action (R. 69, 73, 88, 354).

The law involved here is Section 234 (a) (1) of the Revenue Acts of 1921, 1924, and 1926 (*supra*), providing for the allowance as deductions of all "ordinary and necessary expenses" incurred in carrying on any trade or business.

The Board has heretofore recognized that so-called donations are very often in fact business expenses, deductible under this provision of the law in computing income.

Poinsett Mills, 1 B. T. A. 6;
Anniston City Land Co., 2 B. T. A. 526;
Richmond Hosiery Mills, 6 B. T. A. 1247;
Superior Pocahontas Coal Co., 7 B. T. A. 380;
Ranier Grand Co., 11 B. T. A. 520;

Hirsh-Weis Mfg. Co., 14 B. T. A. 796;
Los Angeles and Salt Lake R. R. Co., 18 B. T. A. 168;
First National Bank of Omaha, 18 B. T. A. 1358;
The Killian Co., 20 B. T. A. 80.

The Courts have also recognized the fact that the Commissioner of Internal Revenue has frequently gone too far in disallowing business expenses on the theory that they were contributions and not deductible in computing income.

Corning Glass Works v. *Com.*, 37 Fed. (2d) 798;
American Rolling Mill Co. v. *Com.*, 41 Fed. (2d) 314;
The Forbes Lithograph Mfg. Co. v. *White*, 42 Fed. (2d) 287.

In *A. Harris & Co.* v. *Lucas* (5 C. C. A.), 48 Fed. (2d) 187, it was held that the two words "ordinary" and "necessary" are not used conjunctively and that Congress had in mind either ordinary or necessary expenses as being allowable deductions. But it matters not what construction is placed upon the phrase, it still follows that contributions, in the case of business corporations, are both very ordinary, in the sense of being of frequent occurrence, and are very necessary, if corporations expect to continue in business.

Webster's dictionary defines "ordinary" as meaning usual, common or customary.

In *Welch* v. *Helvering*, 290 U. S. 111, Mr. Justice Cardozo speaking for this Court said:

> "Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance. Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are common and accepted means of defense

> against attack. Cf. *Kornhauser* v. *United States,* 276 U. S. 145. The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type."

Corporations have no soul and business corporations exist for the purpose of earning profit. It can hardly be assumed that such corporations would from choice reduce their profits by making charitable donations. The logical assumption is—and this is common knowledge among those who understand business—that corporations make their donations either to encourage and increase business, or to avoid adverse criticism and disfavor among the public, which would result in a loss of business. Either purpose is bona fide and legitimate and brings the contributions within the class of ordinary business expenses. *Kornhauser* v. *U. S.,* 276 U. S. 145.

Mr. Herbert Coffman, a witness on behalf of petitioner, testified that the San Francisco Community Chest was similar to organizations of that kind in the East and that, instead of having different associated charities coming around from time to time and asking for gifts and donations, they were all put into one lump sum in the Community Chest and they had one visit a year. He stated that it was practically necessary for petitioner to make these donations from a business standpoint; that they were all expected to contribute; that publicity was given to the contributions by publication of the list of contributors; that if his company, petitioner, had not been on the list, they would have been overrun with people wanting to know what was the trouble and why they had not contributed their share; that the biggest market for the output of their cement plant was in San Francisco and that it would have been a reflection upon petitioner not to have made the donations requested. When Mr. Coffman was asked if, in his opinion, a business could successfully operate without making these expenditures, he

stated that he would not want to be the one to try it; that he thought it would be disastrous (R. 171-174). Mr. Coffman was sales manager of petitioner for the years 1923 to 1926 and was very intimately acquainted with the donations which petitioner made. It is always necessary for a selling organization to maintain its good will and failure to make reasonable donations for the public good is one of the quickest ways to destroy that good will. While Mr. Coffman was not personally consulted regarding these Community Chest donations and while he did not have the say as to whether or not the donations should be made, it was his business as sales manager to be intimately acquainted with the policies and activities of this company, and he was thoroughly competent to state the purpose of making the donations and what the result would have been if the donations had not been made. Mr. Coffman's testimony on this point is fully corroborated by Mr. Richards (R. 270-271).

There was a time when both respondent and the Board of Tax Appeals refused to allow donations to the Community Chest as deductions in computing income, on the theory that they were not authorized by the law. But since the decision in the instant case, the Board has reversed its position and is now allowing Community Chest donations as deductions from income upon a showing that the corporation could not afford to refuse to make the donation and would suffer from a business standpoint if it did. Such was the evidence in the instant case and it is believed that, if the Board had this case now under consideration upon the record made, its decision would be favorable to petitioner rather than adverse.

In *The Evening Star Newspaper Co.*, 28 B. T. A. 762, promulgated July 7, 1933, the Board said:

> "The sole question for decision is whether the petitioner should be permitted to deduct from its gross income its contributions to the Washington Community Chest. Such a contribution when in the nature of a gift is deductible to a limited extent from the gross in-

come of an individual. Sec. 23 (n) (2), Revenue Act of 1928. No such deduction is allowed to a corportation. But either may deduct such a contribution when it is shown that the contribution is in fact a business expense. American Rolling Mill Co. *v.* Commissioner, 41 Fed. (2d) 314; Killian Co., 20 B. T. A. 80. Since a contribution may be either a charitable gift or a business expense, a taxpayer in order to secure a deduction as a business expense must show by sufficient evidence that the expenditure had in a direct sense a reasonable relation to its business (Thomas Shoe Co., 1 B. T. A. 124) or, as said in Killian Co., *supra,* it must be 'reasonably motivated by or related to the proper conduct of the business.' See also American Rolling Mill Co. *v.* Commissioner, *supra.* Tested by these standards we think that the petitioner has shown that its contributions were ordinary and necessary expenses within the meaning of section 23 (a) of the Revenue Act of 1928. Harris & Co. v. Lucas, 48 Fed. (2d) 187.

* * * * * * *

"Counsel for the respondent points out that the petitioner's witnesses were unable to show any specific gain in dollars arising from the contributions. This is an unreasonable demand. Alexander Sprunt & Son, Inc., 24 B. T. A. 599; Matson Navigation Co., 24 B. T. A. 14. It is sufficient that the directors had reasonable grounds to believe that their actions would be beneficial to the corporation. It was not necessary for them to expect additional gain. It was sufficient that they, with reasonable grounds, expected that it would prevent a loss. Kornhauser v. United States, 276 U. S. 145. Under either aspect we think the petitioner is entitled to the deductions claimed."

In a memorandum opinion, entered February 2, 1933, in the case of the *Killian Co.*, Docket 48053, the Board allowed as a deduction a donation made to the Community Chest of Cedar Rapids, Iowa. Since the financial depression came on and the Board's appropriation for expenses has been reduced, it has adopted the policy of entering a memorandum opinion in many cases rather than having opinions printed and published so that they can be cited in the reg-

ular way. Its decision in the *Killian Company* case, just cited, is an instance of that kind and this decision must not be confused with the former reported decision of the Board in the *Killian Company*, 20 B. T. A. 80, promulgated on June 16, 1930, which did not involve the question of deductibility of donations to the Community Chest.

As stated above, the earlier decisions of the Board were adverse to petitioner on this question, but these decisions were probably the result of failure on the part of petitioner to prove facts on which the Board could make a different holding. It is submitted that the Board reached the proper conclusion in *The Evening Star Newspaper Company, supra,* for the reasons therein stated, and that those reasons are equally applicable here. It is therefore submitted that the Board and the Circuit Court erred in refusing to allow the Community Chest donations as deductions in computing income.

VII. CONCLUSION.

In view of the foregoing it is submitted that this Honorable Court should reverse and set aside the decision and judgment of the Circuit Court of Appeals, Ninth Circuit, so far as it pertains to the two questions set out above and therein find and hold for petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 107

OLD MISSION PORTLAND CEMENT COMPANY, A Corporation, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 77–90) is reported in 25 B.T.A. 305. The opinion of the Circuit Court of Appeals (R. 341–355) is reported in 69 F. (2d) 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934. (R. 355–356.) The

petition for a writ of certiorari was filed June 12, 1934. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. In a proceeding before the Board of Tax Appeals does the taxpayer overcome the *prima facie* correctness of the Commissioner's determination of the fair market value of property as of March 1, 1913, by showing that the method employed by the Commissioner in arriving at such value is incorrect?

2. Is the Board of Tax Appeals bound to accept opinion testimony of the taxpayer's witnesses concerning the fair market value of property, notwithstanding the fact that such testimony is opposed by the Commissioner's determination and is contradicted in part by facts disclosed by the record?

3. Whether the amortization of bond discount on the bonds of the taxpayer's affiliate held by the taxpayer should be deducted in computing the consolidated net income of the affiliated companies for the years 1923 to 1926, inclusive.

4. Whether the taxpayer may deduct as business expenses, donations to the San Francisco Community Chest and an amount paid to a fund to promote a referendum for an increased gasoline sales tax levy in order to provide additional funds for road building.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–22.

STATEMENT

The facts found by the Board of Tax Appeals may be summarized as follows:

The taxpayer is a California corporation, organized in 1912 for the purpose of engaging in the manufacture of Portland cement, with an authorized capital of 350,000 shares of common stock of a par value of $10 per share. It is the successor of the San Juan Portland Cement Company incorporated in 1906 and was organized by bondholders of the latter, which defaulted payment of interest upon its bonds in the amount of $1,300,000. At a sheriff's sale the bondholders purchased all of the assets of the company for $20,700. (R. 61.)

The assets so acquired included limestone deposits known as the Barbee, Underwood and Flint deposits, about 88 miles south of San Francisco, stocks and bonds of the San Juan Pacific Railway Company which connected the deposits with the Southern Pacific Railway (a distance of 7 miles), the Chittenden Ranch, and an unfinished cement plant. (R. 61–62.)

Thereafter the bondholders' committee organized the California Central Railroad Company and received its stocks and bonds in exchange for stocks and bonds of the San Juan Pacific Railway Company. (R. 62.)

The taxpayer was then organized and in exchange for 175,000 shares of its stock acquired from the committee the physical assets of the old cement corporation, including the lands (2,463 acres) containing the deposits. The plant was not finished until 1916 and production began in 1918. The deposits were exhausted in 1927. (R. 62.)

The taxpayer claimed deductions for depletion at the rate of ten cents per ton in its income tax returns for 1918 to 1921, inclusive, and at the rate of twenty cents per ton in its returns for 1922 to 1925, inclusive, though in a schedule submitted with the latter returns it suggested that this was the proper rate for these and additional deposits combined and the proper rate for these deposits alone would be seventy-nine cents per ton based on a fair market value of $1,034,398.10 as of March 1, 1913, and estimated tonnage of 1,314,243.62 tons. (R. 62–68.)

During a period in 1920 and 1921 the taxpayer purchased lime rock for ten cents per ton. (R. 64, 83.)

The Commissioner allowed a depletion rate of 3.713 cents per ton by fixing the March 1, 1913 value of the limestone deposits at $63,121 and the content at 1,700,000 tons. (R. 68.)

The taxpayer questioned the fair market value determined by the Commissioner in its appeal to the Board, but the Board sustained the Commissioner's determination.

In its returns for 1923, 1924, 1925 and 1926 the taxpayer claimed deductions of $1,000 for contributions to the San Francisco Community Chest. (R. 69.) The Chest represented several charitable organizations, gifts to the Chest being apportioned among the organizations. (R. 72.) In the return for 1926, the taxpayer deducted the sum of $3,000 listed as a donation (R. 71) to "All California Highway Lobbying", which represented a contribution to a state-wide referendum for increasing the gasoline tax for the purpose of road building. (R. 75.)

The Commissioner disallowed these deductions and upon appeal, the Board sustained the Commissioner's determination.

During the taxable years 1923 to 1926, inclusive, the taxpayer was affiliated with the California Central Railroad Company and the San Juan Pacific Railway Company, and the three corporations filed consolidated returns. The books of the affiliated companies were kept and consolidated income tax returns filed on the accrual basis. (R. 76.)

In 1912 the California Central Railroad Company issued its own bonds at a discount. The amount of amortization applicable to each of the years 1923 to 1926, inclusive, is $3,381.18. In computing the consolidated net income the Commissioner allowed as deductions for bond discount $375.99 for each of the years 1923, 1924 and 1925 and $220.79 for 1926. The amount disallowed rep-

resents the amortization of bond discount applicable to bonds owned by the taxpayer. (R. 76–77.) The Board sustained the Commissioner.

As the result of these and other adjustments not here involved the Board determined deficiencies of $4,298.02, $4,582.09, $5,617.12 and $7,190.98 for the years 1923, 1924, 1925 and 1926, respectively. (R. 92–94.)

The Circuit Court of Appeals approved the Board's determination except with respect to a deduction of a donation to the Y.M.C.A. which the Board had disallowed. The Commissioner has filed no petition with respect to that item.

ARGUMENT

I

The Commissioner determined that the limestone deposits of the taxpayer had a fair market value of $63,121 as of March 1, 1913, for purposes of depletion. The Board and the court below sustained this determination.

The taxpayer seeks to have this Court review this issue of fact upon which both tribunals below have agreed by raising certain questions as to whether the method used by the Commissioner in arriving at his valuation is correct, whether there is evidence to support the Commissioner's determination and whether the opinion testimony of the taxpayer's witnesses who testified to a much greater value does not represent the preponderance of evidence and was not therefore controlling.

We submit that the principles governing all of these matters are too well settled to require further consideration by this Court at this time.

The Commissioner's determination of the fair market value of the property is *prima facie* correct. *Reinecke* v. *Spalding,* 280 U.S. 227; *Welch* v. *Helvering,* 290 U.S. 111; *Alexander Sprunt & Son* v. *Commissioner,* 64 F. (2d) 424 (C.C.A. 4th); *J. & O. Altschul Tobacco Co.* v. *Commissioner,* 42 F. (2d) 609 (C.C.A. 5th); *Crowell* v. *Commissioner,* 62 F. (2d) 51 (C.C.A. 6th); *Helvering* v. *Gregory,* 69 F. (2d) 809 (C.C.A. 2d). The burden rests upon the taxpayer to prove all facts necessary to show that he was entitled to the deduction claimed. *Brown* v. *Helvering,* 291 U.S. 193.

This case presents the same questions concerning whether the Board is bound by the opinion testimony of experts and whether the preponderance of evidence rule applies before the Board that were presented in the petition for a writ of certiorari in the case of *Gloyd* v. *Commissioner,* No. 96, October Term, 1933. (See the opinion of the Circuit Court of Appeals for the Eighth Circuit, 63 F. (2d) 649.) This Court denied certiorari in that case (290 U.S. 633). Moreover, since this Court's decision in *Dayton Power & Light Co.* v. *Public Utilities Commission,* No. 609, October Term, 1933, decided April 30, 1934, there can be no doubt that the Board is not bound to accept the opinion evidence of experts.

Furthermore, this is not a case where the Board must choose between the Commissioner's determination and the uncontradicted opinion testimony of the taxpayer's witnesses. The record discloses facts concerning the price at which similar limestone deposits were sold (R. 147–148), evidence concerning the selling price of stock which was issued in exchange for the deposits and other assets (R. 324–331), and evidence concerning the royalty rate paid for California limestone (R. 83), which show that the valuation of the taxpayer's witnesses and the depletion rate fixed by them were far too high, and which tend to support the Commissioner's determination.

The taxpayer also urges that because the Commissioner introduced in evidence a schedule concerning depletion which the taxpayer had filed, the Commissioner is bound by the depletion rate of seventy-nine cents which was established by a computation in that schedule; again that the introduction of returns in which the taxpayer claimed a depletion rate of ten cents bound the Commissioner to that rate. He cites *Leach* v. *Burr,* 17 App.D.C. 128, 142; *Lyon* v. *Bursey,* 36 App.D.C. 235, and other cases holding that the party introducing documentary evidence is absolutely bound by it and cannot contradict or impeach it.

We submit that the rule referred to and the cases cited do not support the proposition for which they

are cited. The returns and schedule which were admitted in evidence were statements of the taxpayer as to what its taxes were and not adjudications of its tax liability. As the court below held, they were relied upon as admissions against interest and were clearly admissible for that purpose.

II

The taxpayer also claims that the court below erred in refusing to permit it to deduct donations to the San Francisco Community Chest.

While the statutes involved do not allow corporations the deduction for charitable contributions granted to individuals,[1] corporations may deduct donations which constitute ordinary and necessary business expenses under Section 234 (a) (1) of the Revenue Acts of 1921, 1924 and 1926 (*infra,* pp. 14, 17, 18).

The donations must represent both "ordinary" and "necessary" expenses. *Welch* v. *Helvering, supra.* Article 562 of Regulations 62, 65 and 69 (*infra,* pp. 19, 20, 22), provide that donations which legitimately represent a consideration for a benefit flowing directly to a corporation as an incident of its business are allowable deductions from gross income. Since this regulation has been in force under several revenue laws containing the same provision as to the deduction of business expenses by corporations, it has the force of law. *McCaughn*

[1] See Section 214 (a) (11) of the Revenue Act of 1921 and Section 214 (a) (10) of the Revenue Acts of 1924 (U.S.C., Title 26, Sec. 955) and 1926 (U.S.C.App., Title 26, Sec. 955).

v. *Hershey Chocolate Co.*, 283 U.S. 488; *Brewster* v. *Gage*, 280 U.S. 327; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269.

In the present case the taxpayer failed to prove that anything other than an indefinite and indirect benefit was expected from the contributions to the Community Chest. The case is not identical with *Evening Star Newspaper Co.* v. *Commissioner*, 28 B.T.A. 762, relied upon by the taxpayer, for in the latter case there was some evidence that the newspaper has organized the Chest and relied upon it as a principal means of advertising. In any event the Government has not accepted that decision and an appeal is now pending before the Circuit Court of Appeals for the Fourth Circuit. In *Capital Traction Co.* v. *Commissioner*, 27 B.T.A. 926, a donation to a community chest was disallowed by the Board where there was no evidence of a direct benefit. That case is pending on appeal before the United States Court of Appeals for the District of Columbia.

The different results reached in the numerous cases on this question are due to differences in the facts. The instant case is in harmony with the regulations and with the cases involving similar facts. Hence, there is no conflict which justifies review by this Court.

III

The taxpayer also claims as a business expense for 1926, a contribution of $3,000 to a state-wide campaign for a referendum to increase the gasoline

tax for the purpose of road building. (R. 75, 265.) The referendum was successful and the State of California undertook a large road-building program involving the use of cement and other materials. This represented an expense which the taxpayer's witness conceded was a kind of "lobbying" expense. (R. 265.) It was so characterized on the return. (R. 71.)

Article 562 of Regulations 62, 65 and 69 (*infra*, pp. 19, 20, 22), specifically provides that sums of money expended for lobbying purposes and the promotion and defeat of legislation are not deductible. This provision also appeared in Article 562 of Regulations 45, promulgated under the Revenue Act of 1918, and hence had received legislative approval before any of the taxable years here involved. *McCaughn* v. *Hershey Chocolate Co., supra; Brewster* v. *Gage, supra; Mass. Mutual Life Ins. Co.* v. *United States, supra.*

The disallowance of the taxpayer's donation to the campaign for a referendum was clearly in accord with the regulation; the regulation is not in conflict with the statute and is based on sound reasons of public policy. Hence, there is no basis for a reversal of the court's decision on this issue.

IV

In 1912 the California Central Railroad Company issued its bonds at a discount. In the consolidated returns for 1923, 1924, 1925 and 1926, filed

by that company, the taxpayer corporation, and another corporation, the Commissioner disallowed as a deduction the portion of the amortization of discount attributable to bonds held by the taxpayer corporation. The right of a taxpayer to deduct amortized discount over the life of bonds where bonds are issued at a discount is not derived from express provision in the Revenue Act, but is based on Article 545 of Regulations 62, 65 and 69 (*infra,* pp. 18, 20, 22).[2]

The court below upheld the Commissioner's view that the allowance in this case was prohibited because the amortization deduction arose out of an intercompany transaction in respect to which no deduction should be allowed under Article 636 of Regulations 62 and 65 (*infra,* pp. 20, 21), and Article 635 of Regulations 69 (*infra,* p. 22). The Court of Appeals for the District of Columbia reached the same conclusion in *Helvering* v. *Gulf, Mobile & Northern Railroad Co.,* decided May 14, 1934, not yet reported but may be found in 334 C.C.H., p. 9917. That was the view of the Board in this case, the *Gulf, Mobile & Northern Railroad* case

[2] It is not at all clear that this provision of the regulations is valid with respect to bonds issued at a discount before 1912. Cf. *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552. That question is raised in the Government's petition in *Helvering* v. *Union Pacific R. Co.*, No. 51, October Term, 1934. If the argument there advanced is sound, it affords an additional reason why the taxpayer is not entitled to the deduction claimed here.

(22 B.T.A. 233), and *New Orleans, Texas & Mexico Railway Co.* v. *Commissioner,* 6 B.T.A. 436.

These decisions do not appear to be in conflict with any other cases involving intercompany transactions of affiliated corporations. See *Charles Ilfeld Co.* v. *Hernandez,* No. 579, October Term, 1933, decided April 2, 1934; *Burnet* v. *Aluminum Goods Co.,* 287 U.S. 544; *Atlantic City Co.* v. *Commissioner,* 288 U.S. 152; *Commissioner* v. *Liberty Nat. Co.,* 58 F. (2d) 57 (C.C.A. 10th), certiorari denied, 287 U.S. 603; *Fidelity Nat. Bank & T. Co.* v. *Commissioner,* 39 F. (2d) 58 (C.C.A. 8th); *Appeal of Gould Coupler Co.,* 5 B.T.A. 499.

CONCLUSION

The petition presents no question of sufficient importance to justify a review by this Court and it should therefore be denied.

Respectfully submitted.

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JULY 1934.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 254, 260:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

* * * * *

(9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided,* That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: *Provided further,* That in the case of mines, oil and gas wells, discovered by the taxpayer, on or after March 1, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair

market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery, or within thirty days thereafter: *And provided further,* That such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made, except where such net income so computed is less than the depletion allowance based on cost or fair market value as of March 1, 1913; such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

* * * * *

SEC. 240. (a) That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed

upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236."

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 204. (b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5), of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

(c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that in the case of mines, oil and gas wells, discovered by the taxpayer after February 28, 1913, and not acquired as the result of purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter; but such depletion allowance based on discovery value

shall not exceed 50 per centum of the net income (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value. (U.S.C., Title 26, Sec. 935.)

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

* * * * *

(8) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

(U.S.C., Title 26, Sec. 986.)

SEC. 240. (a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secre-

tary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236. (U.S.C., Title 26, Sec. 993.)

Sections 204 (b) and (c) (U.S.C.App., Title 26, Sec. 935), 234 (a) (1) and (8) (U.S.C.App., Title 26, Sec. 986), and 240 (a) and (b) (U.S.C.App., Title 26, Sec. 993) of the Revenue Act of 1926, c. 27, 44 Stat. 9, are substantially identical with the above-quoted provisions of the Revenue Act of 1924.

Treasury Regulations 62:

ART. 545. *Sale and retirement of corporate bonds.*— * * *

* * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds.

* * * * *

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income charitable or other contributions which individuals may deduct under paragraph (11) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See articles 545 and 848. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236 (b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the several schedules required under Form 1120, a corporation filing a consolidated return is required to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 65:

ART. 545. *Sale and retirement of corporate bonds.*—* * *

* * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. * * *

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income

contributions or gifts which individuals may deduct under paragraph (10) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See article 545. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations,

and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236 (b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the several schedules required under Form 1120, a corporation filing a consolidated return is required to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

Articles 545, 562, 563 and 635 of Regulations 69 are substantially the same as Articles 545, 562, 563 and 636 of Regulations 65, above quoted.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 107

OLD MISSION PORTLAND CEMENT COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 77–90) is reported in 25 B. T. A. 305. The opinion of the Circuit Court of Appeals (R. 341–355) is reported in 69 F. (2d) 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1934 (R. 355–356). The petition for writ of certiorari was filed June 12,

1934. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted October 8, 1934, limited to the question of the right of taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest.

QUESTIONS PRESENTED

1. Whether the amortization of the discount on bonds issued prior to March 1, 1913, by a corporation, one of an affiliated group, and owned by the taxpayer, a member of the same group, should be deducted in computing the consolidated net income of the affiliated companies for the years 1923 to 1926, inclusive.

2. Whether the petitioner may deduct as ordinary and necessary expenses, donations to the San Francisco Community Chest.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–21.

STATEMENT

The facts found by the Board pertinent to the above issues may be summarized as follows: During the taxable years 1923 to 1926, inclusive, the taxpayer was affiliated with the California Central Railroad Company and the San Juan Pacific Railway Company, and for each of these years the three

corporations filed consolidated income tax returns. The books of the affiliated companies were kept and the consolidated returns were filed on the accrual basis (R. 76).

In 1912 the California Central Railroad Company issued its bonds at a discount. At some indefinite time the taxpayer acquired a portion of these bonds. In computing the consolidated net income the Commissioner disallowed as deductions amounts representing the amortized discount applicable to the portion of the bonds owned by the taxpayer (R. 76–77). The taxpayer contributed $1,000 in each of the years 1923 to 1926, inclusive, to the San Francisco Community Chest.

The amortized bond discount and the contributions were claimed by taxpayer as deductions and were disallowed by the Commissioner.

The Board of Tax Appeals sustained the Commissioner as to both of the above items and the Circuit Court of Appeals approved the Board's determination.

SUMMARY OF ARGUMENT

1. Amortized discount on the bonds of one of an affiliated group of corporations is not deductible where the bonds are owned by another member of the same group. There is an intercompany transaction and the item should be eliminated in deriving the taxable net income of the united group.

2. Congress considered and rejected a provision permitting corporations to deduct contributions as

such. The Regulation permitting the deduction within the limits therein provided is reasonable, not in conflict with the law, and has received legislative sanction by several reenactments of the law without change. Donations are deductible by corporations only as ordinary *and* necessary expenses. Their deductibility rests upon the facts of each individual case. The record does not show that the donations involved were directly connected with taxpayer's business; that they reasonably bore any relationship to the ordinary scope of the business; that they were made for purposes connected with the operation of the business; that the donee organization was conducted for the benefit of the taxpayer's employees; nor that the donations represented a consideration for benefits flowing directly to the taxpayer. The record does contain evidence that the purpose of the donations was charitable. The Commissioner's ruling has the support of the presumption of correctness which is not outweighed by the evidence.

ARGUMENT

I

In 1912 taxpayer's affiliate issued $320,000 par value of its bonds at a discount of $135,247.40 (R. 42). A portion of these bonds was owned by the taxpayer in the years 1923 to 1926, inclusive. It is on this portion of the bonds that the amortization of discount has been disallowed. Unless there be a provision in the Act or Regulations that fairly

may be read to authorize it, the deduction claimed is not allowable. *Ilfeld Co.* v. *Hernandez,* 292 U. S. 62.

Article 636 of Regulations 62 and 65, *infra,* pp. 18, 20, and Article 635 of Regulations 69, *infra,* p. 21, provides that intercompany transactions (whether or not resulting in any profit or loss to the separate corporations) are subject to elimination from the consolidated taxable net income of affiliated corporations.

The right of a taxpayer to deduct amortized discount over the life of bonds issued at a discount is not derived from express provision in the Revenue Acts, but is based upon Article 545 of Regulations 62, 65, and 69, *infra,* pp. 17, 19, 21. The Regulations being the source of that privilege may properly limit the circumstances under which the privilege may be exercised.

In the instant case one member of the affiliated group acquired the bonds of another. The Treasury Department has consistently considered such a transaction to be an intercompany transaction, and has consistently held that it should be eliminated from consolidated taxable net income. The Board of Tax Appeals and the courts have consistently upheld the Commissioner. *Gulf Mobile & Northern Railroad Co.* v. *Commissioner,* 22 B. T. A. 233, affirmed 71 F. (2d) 953 (App. D. C.); *New Orleans, Texas & Mexico Railway Co.* v. *Commissioner,* 6 B. T. A. 436; and the instant case. In

the absence of clear error or arbitrary action, the rulings should not be disturbed.

Petitioner contends that the item enters the computation of the income of one of the affiliated group but does not appear conversely in the income of another, and therefore it may not be considered an intercompany transaction. This argument is based upon a misconception of amortization. The bond discount for which deduction is claimed was not paid and did not accrue in any one of the years here involved. Amortization of that discount anticipates the payment by one and the receipt by the other of the face value of the bonds at maturity. If this intercompany transaction be not anticipated, there is no basis for the allowance of the amortized discount.

Furthermore, it is the clear intent of each of the Revenue Acts involved to compute consolidated net income as a unit, disregarding the separate corporate entities of the affiliated group. *Burnet* v. *Aluminum Goods Co.,* 287 U. S. 544; *Atlantic City Co.* v. *Commissioner,* 288 U. S. 152; *Commissioner* v. *Liberty Nat. Co.,* 58 F. (2d) 57 (C. C. A. 10th) certiorari denied, 287 U. S. 603; *Fidelity Nat. Bank & T. Co.* v. *Commissioner,* 39 F. (2d) 58 (C. C. A. 8th); *Gould Coupler Co.* v. *Commissioner,* 5 B. T. A. 499.

Affiliation occurs when the corporations are substantially owned or controlled by the same interests. Where consolidated returns are filed, the object is to ascertain the net income of those interests. The

acquisition by one of the consolidated group of the bonds of another of that same group, is the acquisition of the bonds by the unit. The unit both owns and owes the obligation. To permit the deduction claimed here would be to allow the amortization of an expense or loss which to the united group is neither immediate nor prospective. We submit that such is not only against the purport of the Treasury Regulations but is also contrary to the clear intent of the statutes.

In addition to the above we submit that as the bonds were issued prior to March 1, 1913, the discount claimed as a deduction is not allowable for the reasons advanced in the Commissioner's brief filed in the case of *Helvering* v. *Union Pacific Railroad Co.*, No. 51, now pending before this Court. A copy of this brief will be served on the taxpayer.

II

The donations to the San Francisco Community Chest are not deductible as charitable contributions. While the Revenue Acts permit individuals to deduct such donations, they contain no provision granting a like privilege to corporations. In fact, the matter was considered and voted down by Congress during the passage of the Revenue Act of 1918. Cong. Rec. (House) Vol. 56, Part 10, pp. 10426–10428.

The United States Court of Claims has held that donations are not deductible by corporations even

as ordinary and necessary expenses. *Con. Gas, Elec. Light & Power Co.* v. *United States,* 65 C. Cls. 252, wherein the court said (pp. 258, 259):

> But the deductions of "ordinary and necessary expenses" are applicable to both individuals and corporations, and if the deduction now urged is allowable it is singular that a deduction of charitable gifts is allowable to individuals and is not even mentioned in case of corporations. * * *

The above decision was followed in *Alfred J. Sweet (Inc.)* v. *United States,* 66 C. Cls. 654.

Article 562 of Regulations 62, 65, and 69, *infra,* pp. 17, 19, 21, provides that donations which legitimately represent a consideration for a benefit flowing directly to a corporation as an incident of its business are allowable deductions as ordinary and necessary expenses. Article 562 of Regulations 45 relating to the Revenue Act of 1918 contains substantially the same provision. Since this provision has been in effect under several Revenue Acts reenacted without change, it has the force of law. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269. Furthermore, the Regulation should be given effect as it is reasonable and not inconsistent with the provisions of the statutes. *Universal Battery Co.* v. *United States,* 281 U. S. 580.

There are numerous cases in the Federal courts and the Board of Tax Appeals which deal with this question. They all, excepting the Court of

Claims decisions, *supra,* take the view that donations are deductible under Section 234 (a) (1) of the Revenue Acts of 1921, 1924, and 1926, *infra,* pp. 14, 15, 16, if they be ordinary and necessary expenses which come within the limits of Article 562 of Regulations 62, 65, and 69, *infra.* Many of these cases were considered by this Court in reaching its decision in *Welch* v. *Helvering,* 290 U. S. 111, wherein it was said (p. 116):

> To attempt to harmonize them would be a futile task. They involve the appreciation of particular situations, at times with border line conclusions. * * *

The *Welch* case involved the deductibility, as ordinary and necessary expenses, of payments made by an individual to the creditors of a bankrupt corporation. The deductibility of donations was not involved in that case and therefore Article 562 of the above Regulations was not considered.

Expenses to be deductible must be both "ordinary and necessary." *Welch* v. *Helvering, supra.* A donation is an ordinary and necessary expense when it represents "a consideration for a benefit flowing directly to the corporation as an incident to its business." In *American Rolling Mills Co.* v. *Commissioner,* 41 F. (2d) 314 (C. C. A. 6th), the court said (p. 315):

> The question always is whether balancing the outlay against the benefits to be reasonably expected, the business interest of the taxpayer would be advanced. * * *

All decisions are in accord that each case rests upon the facts of that individual case. To the facts in the instant case the Commissioner of Internal Revenue has applied the above standard. His ruling has the support of a presumption of correctness, and the petitioner has the burden of proving it to be wrong. *Welch* v. *Helvering, supra; Wickwire* v. *Reinecke,* 275 U. S. 101; *Jones* v. *Commissioner,* 38 F. (2d) 550, 552 (C. C. A. 7th). The Commissioner has been sustained by the Board of Tax Appeals, before whom the evidence was adduced.

The evidence on this question offered by the taxpayer was the testimony of the witnesses, Herbert Coffman (R. 171–174) and F. S. Richards (R. 266–267). Mr. Coffman testified that the contributions were practically a necessity; that the contributions were published; and that if the taxpayer was not on the list it would be put to quite a bit of annoyance by people "wanting to know what was the trouble" (R. 172). He also testified that he was not an officer of the taxpayer and was not consulted about the donations (R. 174). Mr. Richards testified as follows (R. 266–267):

> The next item is "Community Chest, $1,000.00." San Francisco, like many of the other cities of the country, maintained a Community Chest fund, which is practically an assessment upon the industry and those who are capable of giving it. If we do not contribute, we are placarded; we are

blacklisted, so far as publications are concerned. Every Community Chest contribution of any size is listed in the daily papers as it comes in. From the standpoint from which I look at those things and which I am certain the company looks at them, because I know most of the men making up the company, they feel that the welfare of the community is taken care of—the needs of the community, the extreme needs of the community, are taken care of—by the Community Chest, and they are just as much a part of our general expenses or demands upon the corporation as are those things which may come directly as a labor charge upon our books. I believe today that most of us have begun to believe that we are our brother's keeper to a certain extent, and the Community Chest of San Francisco takes care of those things which we as individuals have no time to take care of, and which would go undone were it not for these community organizations. Boys' Clubs; my own personal contact with the Community Chest in San Francisco was in 1923. Before I went to San Francisco to live I came in contact with the Columbia Park Boys' Club [263], an organization of boys which had made their way for many years, traveling around the world many times with a band, paying their way, really an educational institution which was living on charity. Out of that organization have come some of the prominent musicians of the country.

> Later I came in contact, through that organization, with amateur politics, and I feel certain that any community which does not do what the Community Chest of San Francisco is doing is losing a wonderful opportunity.

The charitable purpose expressed by the latter witness clothes the donations with the characteristics of true gifts, and shears them of all pretense of expenses. The more laudable the motive, the less evidence of the expectation of returning benefit.

It should be remembered that Congress refused to allow corporations to deduct contributions as such; and that the Regulations allow their deduction by corporations only when they represent a consideration for a benefit flowing directly to the corporation as an incident to its business. The benefit must be direct. All charitable donations to some indeterminate extent may be considered indirectly beneficial as a factor in creating good will; but to allow their deduction under the guise of ordinary and necessary expenses would be to open the back door where the front door had been securely locked by Congress. Cong. Rec. (House) *supra.*

To classify the donations as ordinary expenses because they were "necessary" to prevent blacklisting would, as was said in *Welch* v. *Helvering, supra* (at p. 115), "open the door to many bizarre analogies." Such a definition of an ordinary expense may include ransom paid to effect the return

of a kidnapped corporate officer. It may well include all contributions made by corporations.

Taxpayer relies upon *Evening Star Newspaper Co.* v. *Commissioner,* 28 B. T. A. 762. The facts in the instant case are distinguishable from the facts in that case. Moreover, the Government has not accepted that decision and an appeal is now pending before the Circuit Court of Appeals for the Fourth Circuit.

The Board has recognized the fact that a donation to a Community Chest is not a proper deduction by a corporation unless there be sufficient evidence of a direct benefit to the donor corporation. *Capital Traction Co.* v. *Commissioner,* 27 B. T. A. 926. That case was appealed by the taxpayer to the United States Court of Appeals for the District of Columbia, where it was dismissed for want of prosecution by the taxpayer. *A. Harris & Co.* v. *Lucas,* 48 F. (2d) 187 (C. C. A. 5th), cited by the taxpayer, is in direct conflict with *Welch* v. *Helvering, supra.*

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted.

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Assistant Attorney General.
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OCTOBER 1934.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 254:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity;

SEC. 240. (a) That corporations which are affiliated within the meaning of this section may, for any taxable year beginning on or after January 1, 1922, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the

total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity; [U. S. C., Title 26, Sec. 986].

SEC. 240. (a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the

Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236.

(c) For the purpose of this section two or more domestic corporations shall be deemed to be affiliated (1) if one corporation owns at least 95 per centum of the voting stock of the other or others, or (2) if at least 95 per centum of the voting stock of two or more corporations is owned by the same interests. A corporation organized under the China Trade Act, 1922, shall not be deemed to be affiliated with any other corporation within the meaning of this section. [U. S. C., Title 26, Sec. 993.]

Sections 234 (a) (1) (U. S. C. App., Title 26, Sec. 986) and 240 (a), (b), and (c) (U. S. C. App., Title 26, Sec. 993) of the Revenue Act of 1926, c. 27, 44 Stat. 9, are identical with the above-quoted provisions of the Revenue Act of 1924.

Treasury Regulations 62, promulgated under the Revenue Act of 1921:

ART. 545. *Sale and retirement of corporate bonds.*—* * *

* * * * *

(3) (*a*) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. (*b*) If thereafter the corporation purchases and retires any of such bonds at a price in excess of the issuing price plus any amount of discount already deducted, the excess of the purchase price over the issuing price plus any amount of discount already deducted (or over the face value minus any amount of discount not yet deducted) is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases and retires any of such bonds at a price less than the issuing price plus any amount of discount already deducted, the excess of the issuing price plus any amount of discount already deducted (or of the face value minus any amount of discount not yet deducted) over the purchase price is gain or income for the taxable year.

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income charitable or other contributions which individuals may deduct under paragraph (11) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a bene-

fit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. * * *

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See articles 545 and 848. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236 (b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the sev-

eral schedules required under Form 1120, a corporation filing a consolidated return is required to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 545. *Sale and retirement of corporate bonds.*— * * *

* * * * *

(3) (a) If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. * * *

ART. 562. *Donations.*—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under paragraph (10) of section 214 (a). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using

the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising and contributions for campaign expenses, are not deductible from gross income.

ART. 563. *Sale of capital stock, bonds, and capital assets.*—A corporation sustains no deductible loss from the sale of its capital stock. See article 543. If it sells its bonds at a discount, the amount of such discount is treated in the same way as interest paid, and if it retires its bonds at a price in excess of the issuing price, such excess may usually be deducted as expense. See article 545. * * *

ART. 636. *Consolidated net income of affiliated corporations.*—Subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated. Only one specific credit of $2,000, as provided in section 236(b) and article 591, shall be allowed the consolidated group, and this only in case the net income of the group does not exceed $25,000; but if such net income is more than $25,000, the tax imposed by section 230 shall not exceed the tax which would be payable if the $2,000 credit were allowed, plus the amount of the net income in excess of $25,000. In respect of the statement of gross income and deductions and the several schedules required under Form 1120, a corporation filing a consolidated return is re-

quired to prepare and file such statements and schedules in columnar form to the end that the details of the items of gross income and deductions for each corporation included in the consolidation may be readily audited.

Treasury Regulations 69, promulgated under the Revenue Act of 1926: Articles 545, 562, 563, and 635 of Regulations 69 are substantially the same as Articles 545, 562, 563, and 636 of Regulations 65, above quoted.

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OPINION

SUPREME COURT OF THE UNITED STATES.

No. 107.—October Term, 1934.

Old Mission Portland Cement Company, Petitioner, *vs.* Guy T. Helvering, as Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, 293 U. S. —, "limited to the question of the right of the taxpayer to deductions (a) on account of amortization of bond discount, and (b) on account of contributions to the San Francisco Community Chest."

During each of the years 1923 to 1926, inclusive, petitioner and two corporations affiliated with it filed consolidated income tax returns on the accrual basis. In each year one of the affiliated corporations deducted, from gross income, amortized discount allowed upon an issue of its bonds in 1912. In computing the taxable income to be assessed to petitioner, the parent corporation, under the applicable Revenue Acts of 1921 (c. 136, 42 Stat. 227), 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9), the Commismissoner refused to allow the deduction of so much of the amortized discount as was applicable to bonds, issued by its affiliate, which petitioner had acquired by purchase. He also refused to allow credit for the contributions to the Community Chest as not an ordinary and necessary expense, deduction of which the statute permits. His action was sustained both by the Board of Tax Appeals, 25 B. T. A. 305, and the Court of Appeals for the Ninth Circuit, 69 F. (2d) 676.

1. It is no longer open to question that amortized bond discount may be deducted in the separate return of a single taxpayer. See No. 51, *Helvering* v. *Union Pacific Railroad Co.*, decided this day. But the Government insists that the deduction by one affiliate, in a consolidated return, of amortized discount upon its bonds, which are owned by another affiliate, involves an "intercompany transaction" which, under the applicable statutes and regulations,

must be eliminated from the computation of the tax in order to arrive at the true taxable income.

Section 240 of the Revenue Acts of 1921, 1924 and 1926 extends to affiliated corporate taxpayers the privilege of making a consolidated tax return, subject to such restrictions as may be imposed by treasury regulations. The purpose of the section was to provide a method of computing the tax upon the true net income of what is in practical effect a single business enterprise, with substantially common ownership, as though it were that of a single taxpayer, despite the fact that it is carried on by separate corporations whose tax would otherwise be independently computed. See *Burnet* v. *Aluminum Goods Manufacturing Co.*, 287 U. S. 544, 547; *Handy & Harman* v. *Burnet*, 284 U. S. 136, 140; *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 154; *Woolford Realty Co., Inc.* v. *Rose*, 286 U. S. 319; *Appeal of Gould Coupler Co.*, 5 B. T. A. 499, 514-516; cf. Treasury Regulations 62, Art. 636, under the 1921 Act; T. R. 65, Art. 636, under the 1924 Act; T. R. 69, Art. 635, under the 1926 Act.

Each of the regulations controlling consolidated returns, under the applicable Revenue Acts, directs that only one specific credit of $2,000, which § 236 (b) allows to each individual taxpayer, shall be allowed to the consolidated group, and provides that "subject to the provisions covering the determination of taxable net income of separate corporations, and subject further to the elimination of intercompany transactions (whether or not resulting in any profit or loss to the separate corporations), the consolidated taxable net income shall be the combined net income of the several corporations consolidated." It is by the elimination of intercompany transactions from the computation, in order to ascertain "the combined net income of the several corporations consolidated," that the purpose of the statute is effected. See *Burnet* v. *Aluminum Goods Manufacturing Co., supra*, 549, 550. The Government, having thus conferred upon groups of affiliated taxpayers the privilege of computing their tax as though they were a single taxpaying entity, it would require plain language in statute and regulations to support the conclusion that it was also intended that they should retain the advantages which, before affiliation, attached peculiarly to their status as independent tax computing entities. The regulations are aimed at the prevention of a double advantage, to be secured only if affiliated taxpayers are allowed

to treat themselves, at the same moment, as one or many, according to their convenience for purposes of tax computation.

Amortized bond discount is deductible from the taxpayer's gross income only by way of anticipation of payment of the bonds at maturity. It is then that the taxpayer pays the difference, between the amount realized upon the sale of the bonds and their par value, which is the subject of the amortization. *Helvering* v. *Union Pacific Railroad Company, supra.* Here the payment anticipated is from one affiliate to another, an intercompany transaction. If we eliminate it from the computation of income upon the consolidated return, as the regulation directs, there is no anticipated payment of the discount to be amortized and no basis for the deduction.

A single taxpayer who had purchased his own bonds before maturity could not afterwards deduct, from gross income, the amortized discount on the bonds, in anticipation of their payment at maturity. This is equally the case where the obligor and obligee are affiliated corporations claiming the benefit of a statute which permits them to compute their tax as though they were one. It is true that in either case the bondholder may sell his bonds before maturity, and thus renew his obligation to pay them. But in neither is the taxpayer in a position to require the Government to anticipate an event which may never occur, by conferring upon him the benefit of a deduction to which, without its occurrence, he would not be entitled. Having elected to take the benefit of affiliation, the taxpayer cannot complain of a burden which is inseparable from the benefit and which finds its source in the very method of computing the tax from which the benefit is derived.

2. The privilege of deducting charitable donations from gross income, conferred on individual taxpayers by § 214 (a) of the Revenue Acts of 1921, 1924 and 1926, has not been extended to corporations. A proposal to extend it to them was rejected by Congress pending the passage of the Revenue Act of 1918. Cong. Rec., House, Vol. 56, Part 10, 10426-10428. Section 234 (a) (1) of the Revenue Acts of 1921, 1924 and 1926 authorizes corporations to deduct from gross income "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Article 562 of Treasury Regulations 62, interpretative of the 1921 Act, declared that corporations were not entitled to deduct charitable donations. But it recognized

the right to deduct donations "made by a corporation for purposes connected with the operation of its business . . . when limited to charitable institutions, hospitals or educational institutions conducted for the benefit of its employees," and also donations "which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business." These provisions were retained, without substantial change, in the regulations promulgated under the 1924, 1926 and 1928 Acts. Art. 562 of T. R. 65, 69; Art. 262 of T. R. 74. As § 234 (a) (1) to which they pertain has been reenacted in several revenue acts, the regulation now has the force of law. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269, 273.

It is a question of fact in each case whether a donation is made to an institution conducted for the benefit of the donor's employees or is consideration for a benefit flowing directly to the donor as an incident of its business. Here the ruling of the Commissioner, that the deduction was not permissible under the statute and regulations, presumably rests upon a correct determination of the facts. *Welch* v. *Helvering*, 290 U. S. 111, 115. The Board of Tax Appeals found that the gifts to the San Francisco Community Chest were apportioned among the charitable organizations of the City and that the gifts of petitioner were made in the belief that "they resulted in good will toward the petitioner and increased its business." But the Board made no finding of any direct benefit to petitioner's employees or business which the regulations contemplate. Nor was there evidence before it to support such a finding. Our review of determinations by the Board is limited to questions of law raised by its findings or its failure to make findings required by the statute. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 728; *Phillips* v. *Commissioner*, 283 U. S. 589, 599, 600. Compare *Kendrick Coal & Dock Co.* v. *Commissioner*, 29 F. (2d) 559, 564 (C. C. A. 8th); *Commissioner* v. *Langwell Real Estate Corp.*, 47 F. (2d) 841, 842 (C. C. A. 7th).

Affirmed.

Mr. Justice Butler and Mr. Justice Roberts think that so much of the judgment as sanctions the Commissioner's refusal to deduct the bond discount should be reversed.